119-491

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~316.~~ 72

HERMAN GILBERT AND JACOB SCHARTZEL, JUNIOR,
PLAINTIFFS IN ERROR,

vs.

THE MOLINE PLOW COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED OCTOBER 1, 1883.

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No. 316.

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1 *Summons.*

TERRITORY OF DAKOTA, Minnehaha Co., } *ss:*

In the District Court, 4th Judicial District, within and for said Minnehaha County.

MOLINE PLOW COMPANY, Pl'ffs,
ags't
WM. B. DICK, HERMAN GILBERT, & JACOB SCHARTZEL, Def'ts.

The Territory of Dakota sends greeting to Wm. B. Dick, Herman Gilbert, and Jacob Schartzel, Jr., defendants:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer on the subscribers at the office of Mr. Grigsby, in Sioux Falls, D. T., within thirty days after the service of this summons on you, exclusive of the day of service, *on* the plaintiff will take judgment against you for the sum of one thousand dollars and fifty-three cents, with interest thereon from September 15th, 1878, besides costs.

M. GRIGSBY &
WM. A. WILKES,
Plaintiff's Attorneys.

Filed May 30th, 1879.

CYRUS WATTS, *Clerk.*

2 TERRITORY OF DAKOTA, *Minnehaha County,* } *ss:*

In District Court, 4th Judicial District, within and for Minnehaha County.

MOLINE PLOW COMPANY, Pl'ffs,
vs.
WM. B DICK, HERMAN GILBERT, and JACOB SCHARTZEL, Jr., Def'ts.

The plaintiff in the above-entitled action complains of the defendants, and alleges:

I. That it is a corporation organized and existing under the laws of the State of Illinois for the purpose of manufacturing and selling plows and other agricultural implements, and is doing business as such in its corporate name.

II. That heretofore, to wit, on or about the 9th day of March, 1878, at Sioux Falls, in Minnehaha county, Dakota Territory, the defendants, in consideration that the plaintiff, at defendants' request, would fill the orders of one Peter Gillman, to be given during the spring of 1878, for plows and other agricultural implements, made and delivered to the plaintiff a certain letter in writing, addressed to the plaintiff, and in words and figures as follows, to wit:

SIOUX FALLS, D. T., *March 9th*, 1878.

Moline Plow Co., Moline, Ills.

SIRS: We, the undersigned, are acquainted with Peter Gillman, of this place (formerly of Fond du Lac, Wis.), and have no hesitation in endorsing him as an honest, capable business man,
3 & 4 and deserving of confidence and credit. We think your informant in regard to Mr. Gillman's business ability and capacity was in error, if not selfish and malicious. We will satisfy all orders Mr. Gillman gives this spring, such as plows and cultivators.

WM. B. DICK.
H. GILBERT.
JACOB SCHAETZEL, JR.

III. That thereafter and during the spring of 1878 the said Peter Gilman gave to plaintiff his five several orders for plows and cultivators, and plaintiff, in consideration of the promises so as aforesaid made by defendants, and relying and confiding in defendants' said undertakings and promise, did, on and between the 23d day of March, 1878, and the 30th day of May of said year, fill the orders of the said Peter Gillman for plows and cultivators by selling and delivering to him, on credit, at Moline, in the State of Illinois, a large quantity of such plows and cultivators for the sum [of] one thousand & fifty-one & $\frac{5}{100}$ dollars ($1,051.05), upon which account there has been paid the sum of fifty & $\frac{52}{100}$ dollars ($50.52).

IIII. That by the terms of credit agreed upon by & between plaintiff and said Gillman five hundred and fifty & $\frac{53}{100}$ dollars of the said sum because due and payable on the 15th day [of] September, 1878, and the remaining $450 thereof on the 15th day of November, 1878, as the same is shown by two promissory notes
5 given therefor and executed by the said Peter Gillman and the defendant, Wm. B. Dick; and although the time of payment has elapsed, the said notes have not been paid, nor any part thereof; of all which facts the defendants had notice.

V. The plaintiff further alleges that the said defendants, not regarding their said promises and undertakings, have failed and refused to satisfy the said orders so as aforesaid given by the said Peter Gillman, and have not yet paid the sum of money or any part thereof due plaintiff for said goods, although requested so to do.

Wherefore plaintiff demands judgment against defendants for the sum of one thousand and $\frac{53}{100}$ dollars, with interest thereon from the 15th day of September, 1878, and costs of this suit.

MELVIN GRIGSBY &
WM. A. WILKES,
Pl'ff's Att'ys.

6 TERRITORY OF DAKOTA, }
Minnehaha County, } *ss:*

George Smith, being sworn on oath, says that he served the within and foregoing summons and complaint upon the within-named defendants, Wm. B. Dick, Herman Gilbert, and Jacob Schaetzel, by delivering to and leaving with defendants, Dick and Schaetzel, each personally true copies of the same, and by leaving at the dwelling-house of said Herman Gilbert, with a member of said Gilbert's family over the age of fourteen years, true copies of said summons and complaint on the 19th day of April, 1879.

GEORGE M. SMITH.

Subscribed and sworn to before me April 29th, 1879.

[SEAL.] MELVIN GRIGSBY,
Notary Public, D. S.

7 *Answer.*

Minnehaha County District Court.

THE MOLINE PLOW CO., Pl'ff,
ag'st
WILLIAM B. DICK, HERMAN GILBERT, & JACOB SCHAETZEL, Jr., Def'ts

The defendants, Herman Gilbert and Jacob Schaetzel, Jr., answer the complaint of the plaintiffs herein and deny each and every allegation in said complaint contained not hereinafter admitted.

Said defendants admit that on or about the 9th day of March, 1878, they together with defendant, William B. Dick, wrote and sent by mail to the said pl'ffs, at Moline, Ills., the letter set forth in pl'ff's complaint.

And said defendants, Gilbert and Schaetzel, further answering, allege that since writing and sending said letter they, nor either of them, have never received any notice from said pl'ffs that they the said pl'ffs, had accepted or received said letter, or that they would give the said Peter Gilman referred to in said letter any plows and cultivators upon the representations contained in said letter, or would give the said Peter Gilman any credit upon the representations contained in said letter.

8 Defendants, Gilbert and Schaetzel, for further answering for themselves, say that when the def'ts wrote and sent the aforesaid letter the terms of credit agreed upon between the said Peter Gillman and the said pl'ffs were that the said Peter Gillman should pay one-half the amount to become payable on the plows and cultivators to be purchased by him of said pl'ffs on the 15th day of Sept., A. D. 1878, and one-half of said amount on the 1st day of January, 1879.

And def'ts, Gilbert & Schartzel, on information & belief,—that thereafter at some time unknown to these def'ts, Gilbert & Schartzel, or either of them, and without their consent or knowledge, the said pl'ff and said Gillman changed and altered the terms of said credit, and the said Peter Gillman, together with the said def't, William B. Dick, made and delivered to said pl'ffs the two promissory notes mentioned in pl'ff's complaint, whereby five hundred and fifty & $\frac{53}{100}$ dollars of the amount due from Gillman to said pl'ffs became due & payable on the 15th day of November, A. D. 1878, the sum total of said two amounts being the entire indebtedness of the said Gillman to the said pl'ff, and delivered to said pl'ff as collateral security for the securing the payment of said two promissory notes, a large amount

of promissory notes made by divers persons in the vicinity of
9 Sioux Falls to the said Gillman & the said William & Dick; that the said def'ts, Gilbert & Schartzel, had no notice or knowledge of any of the aforesaid proceedings and transactions.

Def'ts, Gilbert & Schartzel, therefore ask that said action be dismissed as to them, and that they have judgment for their reasonable costs.

R. F. PETTIGREW &
C. H. WINSOR,
Att'ys for Def'ts, Gilbert & Schartzel.

TERRITORY OF DAKOTA, } *ss:*
Minnehaha County, }

Herman Gilbert and Jacob Schartzel, Jr., being each severally sworn, say each for himself that he has heard the foregoing complaint read and knows the contents thereof, and that the same is true of his own knowledge.

HERMAN GILBERT.
JACOB SCHARTZEL, JR.

Subscribed and sworn to before me this — day of May, 1879.
[SEAL.] C. H. WINSOR,
Notary Public, D. T.

Filed June 24th, 1879.

CYRUS WALTZ, *Clerk.*

10 TERRITORY OF DAKOTA, *Minnehaha County*:

In District Court.

THE MOLINE PLOW CO., Pl'ffs,
vs.
HERMAN GILBERT, JACOB SCHARTZEL.

We, the jury, find the plaintiff, and *and* assess its damages at the sum of one thousand two hundred & eight dollars and thirteen cents.

ARTEMAS GALE, *Foreman.*

Filed April 13th, 1882.

CYRUS WALTZ, *Clerk.*

11 TERRITORY OF DAKOTA,
Fourth Judicial District, County of Minnehaha:

At a regular term of the district court within and for the county of Minnehaha, in the fourth judicial district of Dakota Territory, held at the court-house in the village of Sioux Falls, in said county, on the 13th day of April, 1882.

Present: The Honorable J. P. Kidder, judge of said court, and the officers thereof.

Judgment for Plaintiff on Trial.

THE MOLINE PLOW COMPANY, Pl'ff,
vs.
HERMAN GILBERT & JACOB SCHARTZEL, Def'ts.

This action having been tried by a jury at a district court held at the court-house in Sioux Falls in and for said county on the 13th day of April, A. D. 1882, before the Honorable J. P. Kidder, judge, and the jury having found and rendered a verdict for said plaintiff and against said defendant- therein for the sum of —, and said verdict having been entered in the minutes of the said court, now, on the motion of Grigsby and Wilkes, plaintiff's attorneys, it is considered and adjudged by the court that said plaintiff recover of the said defendant- the said sum of twelve hundred and eight & $\frac{13}{100}$ dollars, together with fourteen & $\frac{20}{100}$ dollars for their costs and disbursements, amounting in the whole to the sum of twelve 12 hundred and twenty-two & $\frac{33}{100}$ dollars ($1,222.33).

Done in open court this 19th day of April, 1882.

J. P. KIDDER, *Judge.*

Attest: CYRUS WALTZ, *Clerk.*
Filed May 3d, 1882.

CYRUS WALTZ, *Clerk.*

MOLINE PLOW COMPANY *vs.* WILLIAM B. DICK *et als.*

Be it remembered that on the trial of this action, commenced April 12th, 1882, before a jury duly empaneled, the following proceedings were had, to wit:

The plaintiff called CHARLES W. LOBDELL as a witness, who, being sworn, testified as follows:

My name is Charles W. Lobdell; age 48 years; I reside at Moline, Illinois; resided there in 1878 and 1879; I was there secretary and business manager of the Moline Plow Co.; am not now in any manner connected with the company.

Letter marked "B" identified as one received by the company when witness was in the office; also letter marked "C," received at the same time, and both read to the jury as follows:

EXHIBIT B.

SIOUX FALLS, D. T., *March 9th*, 1878.

13 Moline Plow Co., Moline, Ill.

SIRS: We, the undersigned, are acquainted with Peter Gillman, of this place (formerly of Fond du Lac, Wis.), and have no hesitation in endorsing him as an honest, capable business man, and deserving of confidence and credit. We think your informant, in regard to Mr. Gillman's business ability and capacity, was in error, if not selfish and malicious. We will satisfy all orders Mr. Gillman gives this spring, such as plows and cultivators.

WM. B. DICK.
H. GILBERT.
JACOB SCHARTZEL.

EXHIBIT C.

SIOUX FALLS, D. T., *March 9th*, 1878.

Moline Plow Co., Moline, Ill.

SIR: Will you accept my order under the *recommend* inclosed; if so, ship me the breakers as ordered, also the cultivators and about

6 vibrating harrows. Hop*ing* we will get better acquainted. I am sorry about such a report as stated to you, but still I will try and satisfy you, and I know you will think so much more of me. (To-late in season for harrows.)

I remain yours, PETER GILLMAN.

If you accept my order, please ship the goods at once, and oblige.
P. G.

14 WITNESS: After these letters were received I wrote a letter acknowledging the receipt of the letter guaranty and order, and told him the goods would be shipped in a few days. We shipped the goods in pursuance of the letter; followed the letter with a shipment in a few days. I also wrote a letter acknowledging the receipt.

Question. Examine and see if that is the letter?

Answer. Yes, sir; that is a press copy of the letter.

Question. Have you the original letter with you?

Answer. I have not.

Question. What did you do with the original letter?

Answer. That was sent to Gillman; have never had it since.

Plaintiff's counsel offered in evidence the copy made in the letter-book of the Co.

To its introduction defendants' attorneys objected, upon the ground that the copy is secondary evidence, and no foundation has been laid for the introduction of such evidence.

Objection overruled by the court, and defendants then and there excepted.

The copy was read in evidence as follows:

3-14.

Peter Gillman, Esq'r., Sioux Falls, D. T.:

Yours of the 9th is at hand and satisfactory. We will ship your goods in a day or so, & hope they will arrive promptly.

LOBDELL.

Letter marked "S" identified as one received by the company from Gillman and read the jury, as follows.

15 EXHIBIT "F."

SIOUX FALLS, DAKOTA, *March 30th*, 1878.

Moline Plow Co., Moline, Ills.

SIRS: Please ship at once 4 12-inch western queen breakers; 8 16-in. western queen breakers, same as last order, and oblige—

Yours, respectfully,

PETER GILLMAN.

WITNESS: These goods were sent in accordance with this request.

Letter maked "H," also identified as one received from Gilman, and read to the jury as follows:

EXHIBIT "H."

SIOUX FALLS, *April 18th*, 1878.

Moline Plow Co., Moline, Ills.

SIR: I received the first bill of plows & cultivators and harrows as per bill, all in good condition. I am well satisfied with the plows, and hope they will do good work; only freight is high, $40.71 on the first bill. I hope you will try and get better rates.

Please ship me 6 14-inch W. queen breakers, besides the last order. I hope you will try and ship them a little faster, if not plow trade will be out of season.

Yours, truly,

PETER GILLMAN.

16 WITNESS: Our company shipped the goods in pursuance of that order.

Letter marked "J," also identified as one received by the company, and read as follows:

EXHIBIT "J."

SIOUX FALLS, *May* 2, '78.

Moline Plow Com., Moline, Ills.

I received your last plows, 4 12, 8 16, all in good condition. I sent you one order about 10 days ago for 6 14; got no answer as yet. Please ship them at once, for I must have them, and ship me 2 12, 8 16. If you can't furnish me with my orders please let me know at once, and not ship bills before goods, for that is no good to me, having teams laying over one week and waiting for goods.

Truly yours,

PETER GILLMAN.

Also, telegram marked "K," identified as received from Gillman, and read as follows:

EXHIBIT "K."

Dated Sioux Falls, D. T., —— 24 1878.
Received Moline, Ills., May 24th, 3.30 p. m.

To Moline Plow Co.:

Can you ship at once to La Mars, Iowa, one fourteen-inch *inch* Evans sulkey I. B.; those western walking cultivators, twelve two-shovel I. B. cultivators. Answer.

P. GILLMAN.

The plaintiff then offered in evidence the two notes mentioned in the complaint, as follows:

17 $450.00. SIOUX FALLS, D. T. *July 28th*, 1878.

November 15th, after date, for value received, we promise to pay to the order of the Moline Plow Company four hundred and fifty dollars, payable at Sioux B'k, Sioux Falls, D. T., with exchange on New York, or express charges, and interest from date at the rate of ten per cent annually until paid.

If this note is placed in attorney's hands for collection I agree to pay expenses of collection, including reasonable attorney's —.

For the purpose of obtaining credit as specified in above note, — hereby state that — the owner in fee of —— acres of land in section —, township No. —, range —, in the county of ——, State of ——, worth, at a reasonable valuation, $—; and that same is not incumbered except to the amount $— due.

In addition to the above — own $— personal property, above exemptions, which is in my possession, and not incumbered.

No. 7378.

PETER GILLMAN.
WM. B. DICK.

18 $550.53. SIOUX FALLS, DAKOTA, *July 28th*, 1878.

September 15th, after date, for value received, we promise to pay to the order of the Moline Plow Company five hundred and and fifty and $\frac{53}{100}$ dollars, payable at Sioux Falls Bank, Sioux Falls, D. T., with exchange on New York or express charges, and interest from date at the rate of of ten per cent. annually until paid.

If this note is placed in attorney's hands for collection I agree to pay expenses of collection, including reasonable attorneys' fees.

No. 7377. PETER GILLMAN.
WM. B. DICK.

Question. Examine that paper (handing witness paper), and state if you know what it is.

Answer. I do.

Question. State if the signature was made by an agent of your company.

Answer. It was.

Paper offered and read as follows:

Settlement with Mr. Peter Gillman.

SIOUX FALLS, DAKOTA,
Date, July 28th, 1878.

Account M. P. Co., invoice, May 20, 1-78	1,051 05
CR.	
Bills received; date, July 28, '78:	
Due Sept. 15, '78	550 53
Nov. 15, '78	450 00
Cash in balance	50 52

19 Retained, $50.52.

PETER GILLMAN.
MOLINE PLOW CO.,
Per P. C. FOWLER, *Agent.*

480 acres of land and house & lots & money in deed of land in Wisconsin & Massachusetts in name of Wm. B. Dick, and 320 acres of land in deed in name of P. Gillman.

WITNESS: These notes were taken upon that settlement. A blank is furnished our traveling agents to report their business when out on their trips. That is a statement by Fowler, our agent, of his settlement with Gillman. The notes accompanied the statement. They have not been paid. They were sent by the company to the Sioux Falls Bank for collection about the time they became due.

Neither Schartzel or Gilbut have ever in any manner satisfied the order made by Gillman, as I have detailed.

Cross-examination:

I was secretary of the Moline Plow Co. in July, 1878; was secretary five years, continuing a year after that date. I understood the goods shipped subsequent to the letter of March 9th were the breakers and cultivators and six vibrating harrows. There were six 14-inch Western *Western* Queens, listed at $28.00; six-inch Western Queens, listed at $32.00. Those were shipped and the cultivators and six harrows.

20 We gained our information (as to these goods, from the previous order of Gillman, which had been cancelled and kept by the company. The goods were in the previous order that was cancelled. There had been an order sent by Gillman, which has been canceled, and when the order dated, March 9th came, asking for a shipment, we referred back for specifications to this old contract, which had been canceled.

The order of March 9th did not specify when payment was to be made. We usually made contracts in a certain form to ship for the season. We had no contract with Gillman upon which we shipped goods, except these two letters, the letter of guaranty and the order of March 9th, which came with it, asking that the goods be sent.

Witness was here shown a deposition signed by him, before Eugene Lewis, a notary public, on the 7th day of June, 1879, taken on behalf of the plaintiff and used on the former trial, and Exhibit "A," therein referred to.

WITNESS: I made the statement in answer to the third, also the answer to the fourth and the next one. Yes; that deposition was sworn to by me within a short time after the matters had taken place; it was brought to me while on a sick bed by the commissioner. Some part of it, perhaps, I did not understand.

Question. I will ask you now if you know any reason why you received that letter? (Referring to letter Exhibit B.)

21 Answer. Because we had cancelled the order of Gillman given in January and notified him we had refused to ship the goods. On receipt of the guaranty of March 9th we shipped the goods.

(Referring to Exhibit "A.") I have seen that paper before. I-was in the company's possession when we received the guaranty, laid away as dead paper. I presume it was received about Jan'y 21st, 1878. I see marked upon it "canceled;" the cancellation was made later in the year. There was no other order from Gillman prior to March 9th that I know of. We shipped the goods March 9th upon a new contract embraced in the regular season's terms—the regular terms which we gave dealers. I can't say that we notified Gillman of a new contract. I don't know of any notification. I don't know of any letter received from him about it. At the time we shipped the goods it was a written contract, also the letter of guaranty of the defendants. We referred back to the old paper for specifications that was on file for prices; we referred to the old specifications as memoranda. We understood that the terms were the regular season's terms, printed in Exhibit "A."

22 I do not mean to say that we shipped those goods without stating any prices or terms. Mr. Gillman had our price list. He knew what the terms of credit were.

We accepted the guaranty and order of March 9th upon the usual season's terms such as were embraced in that Exhibit "A." The usual season's terms were one-half the first of July, and one-half September first.

In my letter I meant by saying "yours is at hand and satisfactory" that his letter of guaranty was satisfactory to the company; that the guaranty would cover the indebtedness and we were satisfied to send the goods to him.

H. L. HOLLISTER was sworn, and testifies as follows:

These notes (referring to those in evidence) were sent as collections to us from the Moline Plow Company—I presume a few days before they became due. There was a contract, I think, with the notes signed by Schaetzel and Gibbert. I think that was the paper (indicating). When they came I notified Dick & Gillman, and also saw Schaetzel. He said return them; that they were responsible for
the first bill; something to that effect. I understood him to
23 say they considered themselves bound for the first bill ordered
by Gillman. That is all he said.

On cross-examination witness said he conveyed to me the meaning that they were responsible for the first bill only.

Here the plaintiff rested.

And defendants thereupon offered and read in evidence from the deposition of A. L. Carson, taken June 5th, 1879, before Eugene Lewis, a notary public, on behalf of the plaintiff and used on the former trial, as follows:

"EXHIBIT A."

SIOUX FALLS, D. T., *Jan'y 21st*, 1878.

Moline Plow Company, Moline, Illinois.

GENTLEMEN: I hereby order of you the plows and other goods in your price list hereto annexed, to be delivered on board cars at Moline, Illinois, marked Peter Gillman, at prices and terms of warranty annexed, for which I hereby agree to pay you one-half September 15th, 1878, and Jan'y 1, '79, with interest at ten per cent. from maturity, payable at Sioux Falls Bank, Sioux Falls, D. T., exchange or express charges prepaid. Account to be settled monthly by note, payable as above.

Five per cent. cash discount will be allowed on all payments made within thirty days from date of invoice, but no additional discount will be allowed for payment at maturity.

24 All other goods ordered during the season will be on the same terms, and are to be paid for in the same manner.

Consignees will look to carriers for loss or damage to goods when same are shipped and receipted for in good order.

No agreement, conditions, or stipulations, verbal or otherwise, save those mentioned in this contract, will be recognized.

The Moline Plow Company reserves the right to withhold shipments of goods to any parties who owe us notes or accounts past due and unsecured.

Discount from this list 30 per cent Ship on or about March 1st, 1878, via cheapest route.

PETER GILLMAN.
M. P. CO.,
Per P. E. FOWLER.

6 14-inch Western Queen	$28 00
6 16-inch Western Queen	32 00
15 vibrating harrows, 45 teeth	13 00
10 Scotch harrows, 40 teeth	11 00
12 double-shovel iron beam	6 50
6 double-shovel wood beam	5 00

Interrogatory 1st. State your name, age, occupation, and place of residence.

Ans. A. L. Carson; 38 years; secretary of the Moline Plow Company; Moline, Ill's.

25 Int. 2nd. Are you acquainted with the parties to this suit and with one Peter Gilman, of Sioux Falls, D. T.?

Ans. I have been in the office of the Moline Plow Company for seven years past; have no personal acquaintance with the defendants or Peter Gilman, but have corresponded with Gilman in relation to business matters for said company in the year 1878.

Int. 3rd. Look at "Exhibit A," hereto annexed, and state what, if anything, you know concerning it. State fully what was done by plaintiff regarding it.

Ans. "Exhibit A" is the original order sent to the plaintiff by an agent, Mr. Fowler, after looking up the commercial standing of Mr. Gilman. The Company declined to fill the order unless he could furnish good and sufficient security, and this was done by a letter written by my instructions to Mr. Gilman, to which he replied under date of March 9th, 1878, enclosing the letter of credit signed by William B. Dick, H. Gilbert, and Jacob Schaetzel, Jr., which letter is attached to the commission herein, and marked "Ex. B;" to which Mr. Lobdell, then secretary of the plaintiff, replied under

date of March 14th, 1878, by a letter not in power of the
26 plaintiff to produce, an office copy of which, taken from the
letter-book of said company, I have marked "Exhibit E," and
attached hereunto.

Int. 4th. Look at "Exhibit B," hereto attached and state if the same to your knowledge at any time came into the possession of the plaintiff; if so, when was it, and what, if anything, accompanied it, and what was done by the plaintiff concerning it?

Ans. I have no personal knowledge, but the records of the office show that it was received accompanied by a letter of Peter Gillman of even date, and was accepted as security on Mr. Gillman's contract, Jan. 21st, 1878, marked "Exhibit A," and on the faith of which the order was filled. I wish to explain that my correspondence with Peter Gilman referred to in the answer to interrogatory two is not in my handwriting, but was written by clerks under my instructions.

Int. 5. Look at "Exhibit C" hereto attached and state if this paper was received by the plaintiff at the same time and enclosed with the "Exhibit B" last mentioned, and state what was done by the plaintiff concerning said Exhibit C?

Ans. I have no personal knowledge of its receipt, but the records
of the office show that it was received at the same time as
27 Exhibit B, on the faith of which the order was accepted. I
was absent at Kansas City on business for the plaintiff when
Exhibits B and C were received.

Int. 6. State now in detail the number of orders given by Peter Gillman to plaintiff during the spring of 1878, when the same were given, what given for, and give fully different articles furnished by the plaintiff to the said Peter Gillman upon such orders in the order of filling the same?

Ans. All these orders were received during my absence except the original order or contract of Jan. 21st, 1878.

Int. 7. Was there any agreement made at the time of selling goods on said first order "C," or before or afterwards by and between plaintiff and defendants as to the time when and the manner in which said goods should be paid for? And, if so, state what it was.

Ans. As far as I know there was no agreement or contract for payment for goods furnished to Gillman in 1878 other than that mentioned in the original order "Exhibit A," dated Jan'y 21st, 1878, and which the letter of credit "Exhibit B" secured, it being the custom of plaintiff to fill all orders during the season under the terms of the original contract or order, and which is especially mentioned in the printed part thereof.

28 Int. 8. If no agreement was made at first respecting the
credit to be given on said orders of Peter Gillman, state what,
if anything, plaintiff did in the matter subsequently regarding
time of payment.

Ans. As was customary with the plaintiff settlement was made by their agent, P. E. Fowler, for the purpose of liquidating book account by collecting cash $50.52, the balance being taken in notes on shorter time than that mentioned in the original order or contract, and with no intimation of releasing the guarantors. Said notes were not received in payment only so far as a settlement of the account, and there was no further or other consideration for them than the settling of the account and "Exhibit D," a paper so marked and attached — my deposition. Herein is a statement of this settlement. Said notes were signed by Gillman & Dick.

Int. 11. Was there any agreement between the plaintiff and said Gillman or between the plaintiff and said defendants that the time mentioned for payment in said Peter Gillman's order of January 21st, 1878, should govern for any and all the sales made during the spring of 1878 under the defendants' letter of guaranty of March 9th, 1878? If so, state regarding it.

29 Ans. To my personal knowledge there is no specific agreement except the conditions mentioned in the order of Jan'y 21st, 1878, under which all subsequent shipments were made, and the records of the office show no other agreement.

Int. 12. What relation, if any, did the said Gilman's order of January 21st, 1878, bear to the transactions made with said Gilman after receiving the defendants' letter of guaranty?

Ans. The order of Peter Gilman, dated January 21st, 1878, was the contract for goods to be furnished him as specified in said order and also all subsequent orders during the spring of 1878, and the letters of guaranty of defendants was accepted as security for all goods furnished under said order or contract.

Defendants also offered and read in evidence from the depositions of Charles W. Lobdell, identified by that witness on his cross-examination, as follows:

Int. 3. Look at "Exhibit A," hereto annexed, and state what, if anything, you know concerning it. State fully what was done by pl'tf regarding it.

Ans. I have examined "Exhibit A" so mentioned. I know it
was received by the Moline Plow Co., and that on account of
30 the reported commercial standing of said Peter Gilman the
plaintiff declined to fill the order. Afterwards on account of the receipt of a certain guaranty signed by Wm. B. Dick & Gilbert and Jacob Schartzel, Jr., the Moline Plow Co. decided to fill the order, and did so.

Int. 6. State now in detail the number of orders given by Peter Gillman to plaintiff during the spring of 1878, when the same were given, what given for, and give fully the different articles furnished by plaintiff to the said Peter Gillman upon such orders, in the order of filling the same.

Ans. The first order given was "Exhibit A," attached to the commission which was filled about March 23d, 1878. The next order was given March 30th, and was filled about April 15th. All the goods called for in the orders were forwarded to Gilman. The plows called "Exhibit A" were all sent, but only six of the vibrating harrows and no Scotch harrows. The order of March 30th is marked "Exhibit F," and I attach it to my deposition. April 18th, 6 14-

inch Western Queen Breakers, at 28.00, list prices, were ordered, and were sent about May 3rd. "Exhibit H," which I hereto attach, is the order of April 18th. May 2d, two 12-inch extra breakers and 4 16-inch extra breakers, which were sent about May 14th,
31 were ordered. Exhibit which I attach to my deposition is the order of May 2nd. May 24th, 1878, 1, 14-inch Evans sulkey, 3 western cultivators, and 12 double-shovel plows were ordered, and they were shipped to Gillman about May 30th, 1878, which order is "Exhibit K," attached to my deposition. I think there was a breaker ordered June 14th for the Evans sulkey, and shipped June 17, but cannot testify positively from personal knowledge as to this matter.

Int. 12. What relation, if any, did the said Gillman order of Jan'y 21st, 1878, bear to the transactions made with the said Gilman after receiving the defendant's letter of guaranty?

Ans. It, in connection with the guaranty, constituted the contract upon which goods were sent; that is my understanding of it.

And defendants further offered in evidence interrogatory 11 and the answer thereto, as follows:

Int. 11. Was there any agreement between the plaintiff and said Gillman, or between plaintiff and said defendants, that the time mentioned for payment in said Petier Gillman's order of Jan'y 21st, 1878, should govern for any and all the sales made during the spring of 1878, under the defendant's letter of guaranty of March 9th, 1878? If so, state regarding it.

32 Ans. As I understood it, the terms for the season were stated in the original order, "Exhibit A," attached to commission, and the guaranty was for the same time.

To which plaintiff's counsel objected on the ground that the answer is not responsive to the question.

The objection was by the court sustained and this evidence excluded, to which ruling the defendants then and there excepted.

Peter Gilman was then sworn, and testified as follows:

I have seen this paper before (referring to contract of January 21st, 1878, "Exhibit A"). That is my signature. The last time I saw that paper was when we settled up for the goods in July, 1878. Mr. Fowler had that paper and I had another one. Mr. Dick and William Mason were present when we settled. We settled up for all the goods I had had from the company for the season, amounting, I think, to $1,050.00. I paid him $50.00 in cash, and gave the notes of myself and Dick for the balance. These are the notes (referring to the notes in evidence). Along in September in the same season we gave them, in farmers' notes, some twelve hundred and odd dollars. They were farmers' notes taken for the goods. They have them still; have never seen them since.
33 When we settled with the gentleman in July we had nothing before us but this contract and the bills of the goods shipped me; settled up by this contract. These were two of them, signed by me and Fowler, one kept by me and one they kept. The

one they kept is the one we had before us at the time we settled. That is the one they settled by, prices and everything.

WILLIAM MASON was next sworn, and testi[fied] as follows:

In July, 1878, I was in the employ of Gilman and Dick, in Sioux Falls. I was present at the settlement, about the last of July, 1878, between Fowler and Gilman and Dick. I then saw this paper ("Exhibit A"). It was on the table that Fowler and Gillman were sitting by talking their matters over. I was salesman for the firm, and was present and heard the conversation. There was some misunderstanding about the time of settlement. The agent said he had given more time than the company wished to have given; so they compromised the matter and settled that both notes should be due in the fall of 1878; one was $450.00 and one for $550.00. I saw the execution of the notes. Mr. Dick was there; did not see Gilbert or Schartzel there.

34 Cross-examination:

Have not seen this paper since that time. Can't say there were two of these papers there; the agent had the original, and, as I understood it, Gillman had a copy. I think $50 in money passed between them.

I remember the time Fowler was there, because this transaction took place in a little restaurant; don't know as I can repeat all the conversation. It drifted into the business of a settlement. I understood that they settled by this contract. They referred to it there.

JACOB SCHARTZEL sworn and testified:

I was acquainted with P. E. Fowler. I met Mr. Fowler some time in July, 1878, on the street, and had a few minutes' conversation with him, and asked him how Mr. Gillman was getting along. He said first rate; said he had sold the bulk of the goods. I asked
him how he was getting along about payments. He said,
35 not quite as well as we had anticipated. He said, I will have
it all settled up before I get out of town. He said he hadn't
seen Gillman yet, but was going out to the farm to see him. He said, I am going to settle it all up satisfactory to both parties; did not see him afterwards.

Was not present when these notes were taken from Gilman and Dick; knew nothing about it at the time; didn't know about it until after they were after due and I was called into the bank. Either Mr. Hollister or Mr. Loring took out this letter of guaranty and the notes; told him I had nothing to do with the notes. I said he might so inform the Moline Plow Co. That was all that transpired in regard to the matter.

On cross-examination witness said:

I told Hollister at the time this guaranty was out of existence, that we had been hold*en* for the first order. Hollister said, how did you come to sign such a letter of guaranty? Said I happened along Gilbert's place of business, and he called me in there.

HERMAN GILBERT was then sworn, and testified:

Know nothing of the settlement in July, 1878, between
36 Fowler and Gilman at the time; never consented to any such settlement; was not consulted about it; was told sometime after by Gilman about it.

And defendant thereupon rested.

CHARLES W LOBDELL, recalled, testified as follows:

At the time this letter of guaranty was received Mr. Carson was not at home; he was absent 4 or 5 months.

I knew Mr. P. E. Fowler; he was general salesman, traveling and taking orders; went around taking notes and making collections and settlements.

The only records of the company referred to by Mr. Carson, except those produced here, are the orders copied into the shipping clerk's book.

In explanation of witness' answer to interrogatory 12 he says:

I suppose the contract of Jan. 21st was canceled and was laid away with the papers in the case. It was brought out when the goods were shipped. It was used for specifying the kind of breakers and prices.

We had no other data to go by when we received Gilman's order, March 9th.
37 There was some goods in the March order not in the order of June 21st. We filled both from the March order and the one before.

After the company received the order accompanying the guaranty the goods shipped were charged up on the books, just as a man would do here in a retail store.

The foregoing was all the evidence introduced or offered by either party on trial.

It further appeared and was admitted by the parties that the defendant, William B. Dick, made no answer in the case, and that he died some time prior to this trial.

And the evidence having now been closed, before the court charged the jury the defendant's counsel presented to the court three special issues in writing, numbered 1, 2, and 3, as follows:
38 1. Did the defendants at *any* time of giving the letter of guaranty understand that the orders of Peter Gilman therein referred to be given and filled upon a credit; and, if so, upon what terms of credit?

2. Were the goods in question in fact ordered by Gilman and sent by the plaintiff upon the terms of credit specified in the order (a contract) of Jan'y 21st, 1878?

3. Were the terms of credit agreed upon between the plaintiff and Gilman, if any, changed upon the settlement of July 28, 1878, without the consent of the defendants?

And, in writing, asked the court to submit said isssues, and each of them, to the jury, and to instruct the jury, in their discretion, they may render a special verdict upon said issues, or any or either of them ; which request the court denied.

And to this ruling of the court the defendants then and there ex-
cepted, and the court thereupon charged the jury as follows :
39 (1). The plaintiff in this action seeks to recover against the
defendants upon a certain letter of credit written by defendants
to the plaintiff. The defendants admit that on or about the 9th day
of March, 1878, they, together with William B. Dick, wrote and sent
by mail to the plaintiff the letter, which is as follows, to wit :

SIOUX FALLS, D. T., *March* 9, 1878.

Moline Plow Co., Moline, Ills.

SIRS : We, the undersigned, are acquainted with Peter Gilman, of this place (formerly of Fond du Lac, Wis.), and have no hesitation in endorsing him as an honest, capable business man, and deserving of confidence and credit. We think your informant in regard to Mr. Gilman's business ability and capacity was in error, if not selfish and malicious. We will satisfy all orders Mr. Gilman gives this spring, such as plows and cultivators.

WM. B. DICK.
H. GILBERT.
JACOB SCHARTZEL, JR.

It is the province of the court to construe this guaranty or letter of credit, and to state to you the law governing the same.

We are to derive the interest of the guarantors from the
40 words used. They may specify exactly the terms upon which
they will be bound, and rely strictly upon the agreement, but
they are to be held to the full extent of this and the words of a guaranty will be taken as strongly against guarantors as the sense will admit. So I instruct you, first, that this letter prescribes no mode of credit to be given, nor any terms of credit, and does not limit the amount thereof. It is not even a proposition to become surety for Gilman, but an absolute undertaking to pay for the goods if he did not. "We will satisfy all orders Mr. Gilman gives this spring, such as plows and cultivators," is their language, and the term to satisfy, as here used, I construe to mean to make payment or to pay to the extent of the claim. The undertaking of the defendants is absolute and unconditional, and in pursuance of its terms the plaintiff was authorized to fill the orders of Gillman, given during the spring of 1878, to any extent and upon any terms that might subsequently be agreed upon, or, if no terms were agreed upon, then plaintiff might have dealt with Gilman in accordance with its ordinary custom and usage, and for all such orders defendants are liable.

(2.) If you believe from the evidence that the plows and culti-
vators were sold and delivered to Gilman on the orders of Gilman,
dated the 9th of March, 1878, and thereafter, in connection
41 with the letter of the defendants to the plaintiff, then the
plaintiff was authorized by this letter of the 9th of March

to hold defendants liable for all the orders of Gilman given in the spring of 1878, and at the expiration of that time plaintiff was at liberty to accept the notes of Gilman & Dick for the goods ordered by him during said spring and to follow out its usual course of dealing in such cases, and the defendants are not discharged from their obligation imposed by said letter because of such settlement and the taking of such notes.

(3.) This letter does not, by its terms, express or imply the necessity of giving notice of its acceptance by the plaintiff, and hence the defendants, so far as this point is concerned, are liable without the necessity of giving defendants notice of acceptance.

(4.) Again, you are instructed that the fact that a large lot of farmers' notes was taken as collateral security for the notes of Gilman & Dick constitutes no defense to this action, and, so far as this point is concerned, the plaintiff is entitled to recover, notwithstanding the taking of said collaterals.

42 (5.) You are further instructed that the defendants herein are not discharged from the liability incurred by their letter of credit by reason of any arrangement had by them with P. E. Fowler, the agent of said company, that they, the defendants, should be relieved from their liability on the letter of credit.

Again, you are further instructed that said letter of credit refers to orders to be given by Gilman in the future subsequently to the writing of the letter of credit, and now, if you believe from the evidence that there was no agreement had between plaintiff and Gilman as to terms of credit to be given, then the plaintiff was at liberty to sell to Gilman goods upon the terms usual in dealing with the customers and to take notes in settlement thereof and the defendants would not be discharged from their liability upon said letter of credit because of such settlement.

If you shall come to the conclusion at this point in the case that the plaintiff is entitled to recover, your verdict should be for it unless the defendants shall prevail in their defense, which we will now consider.

43 It is claimed by the defendants who are defending in this action that their only liability was as guarantors of a certain agreement between the plaintiff and one Peter Gilman for the purchase of certain plows and cultivators ordered by him in the spring of 1878, and that such agreement was contained in the order of Jan'y 21st, 1878, introduced in evidence in this case, and further, that this agreement was altered in certain respects by the parties thereto without the consent of these defendants, whereby they were exonerated from liability.

And it is the law governing such cases that a guarantor is exonerated if by any act of the creditor, without the consent of the guarantor, the original agreement of the principal debtor is altered in any respect, or the remedies or rights of the creditor against his debtor, in respect to the agreement, in any way impaired or suspended.

Now, if you find from the evidence that the order of Gilman on the plaintiff, dated the 21st day of January, 1878,

was the agreement between the plaintiff and Gilman upon which the plows and cultivators were sold and delivered; and if you further find from the evidence that by the terms of the agreement of purchase said Gilman was to pay for the goods bought by him, one-half on September 15th, 1878, and the balance
on January 1st, 1879, with interest at ten per cent. per an-
44 num from maturity, and that the accounts for such goods
were to be settled by him monthly, by note, payable as above mentioned, as specified in the order of Jan'y 2nd, 1878; and that afterwards, on or about July 28th, 1878, upon an accounting and settlement between the plaintiff and said Gilman, said agreement was, by the plaintiff, without the consent of these defendants, altered in any respect in the time of payment or in the proportionate part, payable in the first payment or in the matter of interest, then such alterations would exonerate these defendants, and the plaintiff cannot recover against them in this action.

And in determining the liability of these defendants you are to consider whether, by the terms of the settlement and the taking of the two notes upon such settlement, the plaintiff impaired or suspended its remedy against Gilman in any respect.

In other words, did the settlement and the taking of those notes still leave the plaintiff free to sue upon its claims for goods and en-
force them by legal proceedings in the same manner and
45 & 46 within the same time and to the same extent that it could
have done had not such settlement and liquidation been had? If not, then there was such impairment or suspension of the plaintiff's remedy against Peter Gilman as would in law exonerate these defendants.

And so, if you find that there was any alterations of the agreement between the principal parties, or any suspension of the plaintiff's remedy against Gilman by the plaintiff, without the consent of
the guarantors, then you should — for the defendants.

47 And the defendants then and there duly excepted to that
portion of the plaintiff's first instruction commencing "we are to derive the intent" to the end of the instruction.

And also duly excepted to the plaintiff's second instruction as modified and given.

And further excepted to the plaintiff's fifth instruction.

And the jury having returned into court their verdict in favor of the plaintiff, the defendants subsequently, on or about April 21st, filed their motion for a new trial as follows:

Territory of Dakota, *County of Minnehaha:*

In the District Court.

Moline Plow Company *vs.* William B. Dick *et als.*

And the defendants, Herman Gilbert and Jacob Schaetzel, Jr., upon all the pleadings, proceedings, and minutes of the court in this action, move the court to set aside the verdict and to grant a new trial herein for the causes following:

1. The verdict is against law.

48 The evidence is insufficient to sustain the verdict—

(1.) In that, by the terms of credit agreed upon between the plaintiff and Gilman as alleged in the complaint, $550.53 became due September 15, 1878, and the remaining $450.00 on Nov. 15, 1878, while the proof shows that by the terms of credit actually agreed upon between said parties one-half of the whole amount became due Sept. 15, 1878, and the other half January 1st, 1879.

(2.) In that the evidence shows that the orders of Gilman mentioned in the defendants' letter of guaranty were given by Gilman and accepted by the plaintiff upon terms of credit by which one-half of the amount of said orders became due Sept. 15, 1878, and the other half Jan. 1st. 1878, with interest at ten per cent. after maturity only, and that subsequently, on July 28, 1878, said terms of credit were altered by agreement between the plaintiff's agent and Gilman, without the consent of these defendants, whereby the terms of credit were made $550.53 due Sept. 15, 1878, with interest on both of said sums at ten per cent. from July 28, 1878.

(3.) Errors in law occurring at the trial:

(1.) Error in admitting in evidence upon the trial the letter-press copy of plaintiff's letter to Gilman, dated March 14, 1878.

49 (2.) Error in refusing to allow the 11th interrogatory and the answer thereto in the deposition of Chas. W. Lobdell as evidence on the trial.

(3.) Error in giving that portion of the plaintiff's first instruction commencing "we are to derive interest" to the end of the instruction.

(4.) Error in giving the plaintiff's second instruction as modified by the court.

(5.) Error in giving the plaintiff's fifth instruction.

(6). Error in refusing to permit the jury to find specially as requested by defendants.

WINSOR AND SWEZEY,
Def'ts' Att'ys.

And gave due notice of their intention to move for a new trial, as therein specified, and this motion having been duly continued to hearing to May 29th, 1882, the following proceedings were had, to wit:

50 TERRITORY OF DAKOTA, *County of Minnehaha:*

In the District Court.

MOLINE PLOW COMPANY *vs.* WM. B. DICK *et als.*

The motion of Herman Gilbert and Jacob Schaetzel, Jr., for a new trial made and filed in this action on April 21st, 1882, having been duly continued for hearing until this time, and the same coming on now to be heard, Winsor & Swezey appearing for the said defendants and Wm. A. Wilkes for the plaintiff, and the court being fully advised:

It is ordered that said motion be, and the same is hereby, overruled *pro forma.*

Done in open court this 29th day of May, 1882.

J. P. KIDDER, *Judge.*

And to the foregoing order overruling said motion the defendants, Herman Gilbert and Jacob Schaetzel, Jr., duly excepted.

J. P. KIDDER, *Judge.*

And by consent of counsel the time within which said defendants may prepare & present for settlement a bill of exceptions in said action is extended until the August term, 1882, of the Lincoln county district court, to be held at Canton, D. T.

J. P. KIDDER, *Judge.*

51 And as the matters aforesaid do not otherwise appear the following bill of exceptions is allowed, and upon due notice to the parties settled and signed and made a part of the judgment-roll in the above-entitled action.

Canton Aug. 29th, 1882.

J. P. KIDDER, *Judge.*

Filed Sept. 6th, 1882.

CYRUS WATTS,
Clerk of Dist. Court,
By H. M. AVERY, *Deputy.*

TERRITORY OF DAKOTA, *County of Minnehaha :*

In the District Court.

MOLINE PLOW COMPANY *vs.* WILLIAM B. DICK *et als.*

TERRITORY OF DAKOTA, } *ss :*
Fourth Judicial District, }

I, J. P. Kidder, judge of the district court within and for the county of Minnehaha, in said district, before whom the above-entitled action was tried, do hereby certify that the foregoing papers, to wit, summons, complaint, answer, verdict, judgment, and bill of exceptions, are contained in and constitute the judgment-roll, and the whole of the judgment-roll, in said action.

J. P. KIDDER, *Judge.*

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52 TERRITORY OF DAKOTA, *County of Mennehaha :*

In the District Court, Fourth Judicial District.

MOLINE PLOW COMPANY

vs.

WILLIAM B. DICK, HERMAN GILBERT, and JACOB SCHAETZEL, Jr.

Please take notice that the defendants, Herman Gilbert and Jacob Schaetzel, Jr., hereby appeal from the judgment entered in the above-entitled action on the 19th day of April, A. D. 1882, in favor of the plaintiff and against said defendants for the sum of $1,222.33 to the supreme court of the Territory, and upon said appeal the appellants will, among other things, ask to have reviewed by the supreme court the order of the district court made May 29th, 1882, overruling the motion for a new trial in said action.

Yours, &c., WINSOR & SWEZLEY,
Att'ys for Defendants.

To M. Grigsby and Wilkes & Wills, att'ys for plaintiff, and to Cyrus Watts, clerk of district court for Minnehaha county, D. T.

Due service of the foregoing notice admitted this 6th day of September, A. D. 1882.

W. A. WILKES,
Of Pl'ff's Attorneys.
CYRUS WATTS,
Clerk of District Court,
By H. M. AVERY, *Deputy.*

53 & 54 TERRITORY OF DAKOTA,
County of Minnehaha, Fourth Judicial District. } *ss:*

I, Cyrus Watts, clerk of the district court within and of the said county of Minnehaha, in the fourth judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript & copy of the notice of appeal and proof of service thereof, of the judgment roll, and of the certificate of the judge in the above-entitled action, wherein the Moline Plow Company is plaintiff and Wm. B. Dick, Herman Gilbert, and Jacob Schartzel, Jr., are defendants, as the same now remains of record in the said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 21st day of September, A. D. 1882.

CYRUS WALTS,
Clerk of the District Court, Minnehaha County, D. Ter.

Fees for transcript, $13.10.

55 In the Supreme Court of the Territory of Dakota. October Term, A. D. 1882.

MOLINE PLOW COMPANY, Respondent,

vs.

HERMAN GILBERT and JACOB SCHARTZEL Jr., Impleaded with WM. B. DICK, Appellants.

And now come the appellants, Herman Gilbert and Jacob Schartzel, Jr., above named, by Winsor & Swezy, their atty's, and allege that on the face of the record aforesaid there is manifest error in this, to wit:

I. The court below erred in admitting in evidence the letter-press copy of plaintiff's letter of March 14, 1878, to Peter Gilman.

II. The court erred in refusing to allow the 11th interrogatory and the answer thereto in the deposition of Charles W. Lobdell to be introduced in evidence.

III. The said court erred in refusing to submit to the jury the special issues requested by the defendants and to allow them in their discretion to find upon said issues.

IV. The court erred in giving the instruction (No. 1, plaintiff's request) commencing "we are to derive the intent" to the close of the instruction.

V. The court erred in giving the plaintiff's request No. 2 as modified and given.

56 VI. The court erred in giving the plaintiff's request No. 5.

VII. The court erred in overruling defendants' motion for a new trial.

VIII. The verdict was against law, and no judgment could be entered thereon.

IX. The evidence is insufficient to sustain the verdict in that there is no evidence that the defendant's guaranteed any other terms of credit than equal payments, due Sept. 15th, 1878, and Jan'y 1st, 1879, and there is no evidence that they guaranteed any payment Nov, 15, 1878, as alleged in the complaint. The evidence is also insufficient in that the whole proof shows, without conflict, that the terms of credit referred to in the letter of guaranty and agreed upon between the plaintiff and Gilman, were materially changed by the parties on July 28, 1878, without the consent of the defendants.

WINSOR AND SWEZEY,
Atty's for Appellants.

57 [Endorsed:] Supreme Court. No. 128. Moline Plow Co., respondent, *vs.* William P. Dick *et al.*, appellants. Record filed September 25th, 1882. B. S. Williams, clerk.

58 *Appeal from the District Court of Minnehaha County.*

TERRITORY OF DAKOTA, *ss:*

In Supreme Court. October Term, A. D. 1882.

MOLINE PLOW CO., Plaintiff & Respondent,
vs.
HERMAN GILBERT and JACOB SCHAETZEL, Jr., Defendants and Appellants.
} No. 128.

And now, this 12th day of October, A. D. 1882, the above-entitled cause coming on for argument & hearing, L. S. Sweezey, Esq'r, appearing with oral argument for appellants, and M. Grigsby, Esq'r, *contra*, and thereupon cause submitted to the court.

Attest: B. S. WILLIAMS, *Clerk.*

59 *Appeal from the District Court of Minnehaha County.*

THE UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota, }

In the Supreme Court. October Term, 1882.

MOLINE PLOW COMPANY, Plaintiff & Respondent,
vs.
HERMAN GILBERT and JACOB SCHAETZEL, Jr., Defendants & Appellants.

This action coming on to be heard at the October, A. D. 1882, term of said supreme court, at the supreme court room, in the city of Yankton, D. T.

Present: A. J. Edgerton, chief justice; and G. C. Moody, J. P. Kidder and S. A. Hudson, associate justices:

And the appeal herein having been argued by L. S. Sweezey, Esq'r, for the appellant, and by Melvin Grisby, Esq'r, for the respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Minnehaha county, appealed from herein, be, and the same is hereby, in all things affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that the plaintiff and respondent have and recover of the defendants & appellants his costs and disbursements on this appeal expended, taxed and allowed at twenty-one dollars and twenty-five cents.

By the court: A. J. EDGERTON,
Chief Justice Supreme Court, D. T.

All the justices concurring.

60 [Endorsed:] No. 128. In supreme court, Territory of Dakota. October term, 1882. Moline Plow Company, plaintiff & respondent, *vs.* Herman Gilbert & Jacob Schaetzel, Jr., defendants & appellants. Filed this 14th day of October, 1882. B. S. Williams, clerk.

61 In the Supreme Court of the Territoay of Dakota. October Term, A. D. 1882.

MOLINE PLOW CO., Respondent,
against
HERMAN GILBERT *et al*, Appellants.

It is hereby stipulated and agreed by and between the above-named parties that the costs to be taxed in favor of the respondent in the above-entitled action in the said supreme court on the trial there had in said October term shall be the sum of twelve dollars for respondent's brief.

WINSON & SWEZY,
Att'ys for Appellants.
GRIGSBY AND WILKES,
Att'ys for Respondent.

62 In the Supreme Court of the United States.

HERMAN GILBERT and JACOB SCHAETZEL, Jr., Plaintiffs in Error,
vs.
MOLINE PLOW COMPANY, Defendant in error.

Know all men by these presents that we, Henry L. Hollister and Benjamin F. Campbell, of Minnehaha county, Territory of Dakota, are held and firmly bound unto the Moline Plow Company in the sum of three thousand dollars, to be paid to the said Moline Plow Company, its successors and assigns; to which payment will and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of November, 1882.

Whereas Herman Gilbert and Jacob Schaetzel, Jr., have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment of the supreme court of the Territory of Dakota rendered in the above-entitled action, in which the said Herman Gilbert and Jacob Schaetzel, Jr., were appellants and the said Moline Plow Company was respondent:

Now, therefore, the condition of this obligation is such that if the above-named Herman Gilbert and Jacob Schaetzel, Jr., shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void, else to remain in full force and virtue. 63

H. L. HOLLISTER.
B. F. CAMPBELL.

Sealed and delivered in presence of—
GUY C. WEED.

TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

On this 1st day of November, 1882, before me personally appeared Henry L. Hollister and Benjamin F. Campbell, known to me to be the persons who are described in and who executed the above and foregoing instrument, and severally acknowledged to me that they executed the same.

GUY C. WEED,
Notary Public in & for Dakota.

TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

Henry S. Hollister and Benjamin F. Campbell, being severally sworn, *and* depose and each for himself says that he is a resident and freeholder of the county of Minnehaha, in the Territory of Dakota, and that he is worth in property not exempt from execution the sum of three thousand dollars over and above all his debts and liabilities.

H. L. HOLLISTER.
B. F. CAMPBELL.

59 *Appeal from the District Court of Minnehaha County.*

THE UNITED STATES OF AMERICA, } *ss*:
Territory of Dakota, }

In the Supreme Court. October Term, 1882.

MOLINE PLOW COMPANY, Plaintiff & Respondent,
vs.
HERMAN GILBERT and JACOB SCHAETZEL, Jr., Defendants & Appellants.

This action coming on to be heard at the October, A. D. 1882, term of said supreme court, at the supreme court room, in the city of Yankton, D. T.

Present: A. J. Edgerton, chief justice, and G. C. Moody, J. P. Kidder and S. A. Hudson, associate justices:

And the appeal herein having been argued by L. S. Sweezey, Esq'r, for the appellant, and by Melvin Grisby, Esq'r, for the respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Minnehaha county, appealed from herein, be, and the same is hereby, in all things affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that the plaintiff and respondent have and recover of the defendants & appellants his costs and disbursements on this appeal expended, taxed and allowed at twenty-one dollars and twenty-five cents.

By the court: A. J. EDGERTON,
Chief Justice Supreme Court, D. T.

All the justices concurring.

60 [Endorsed:] No. 128. In supreme court, Territory of Dakota. October term, 1882. Moline Plow Company, plaintiff & respondent, *vs.* Herman Gilbert & Jacob Schaetzel, Jr., defendants & appellants. Filed this 14th day of October, 1882. B. S. Williams, clerk.

61 In the Supreme Court of the Territoay of Dakota. October Term, A. D. 1882.

MOLINE PLOW CO., Respondent,
against
HERMAN GILBERT *et al*, Appellants.

It is hereby stipulated and agreed by and between the above-named parties that the costs to be taxed in favor of the respondent in the above-entitled action in the said supreme court on the trial there had in said October term shall be the sum of twelve dollars for respondent's brief.

WINSON & SWEZY,
Att'ys for Appellants.
GRIGSBY AND WILKES,
Att'ys for Respondent.

62 In the Supreme Court of the United States.

Herman Gilbert and **Jacob Schaetzel**, Jr., Plaintiffs in Error,
vs.
Moline Plow Company, Defendant in error.

Know all men by these presents that we, Henry L. Hollister and Benjamin F. Campbell, of Minnehaha county, Territory of Dakota, are held and firmly bound unto the Moline Plow Company in the sum of three thousand dollars, to be paid to the said Moline Plow Company, its successors and assigns; to which payment will and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of November, 1882.

Whereas Herman Gilbert and Jacob Schaetzel, Jr., have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment of the supreme court of the Territory of Dakota rendered in the above-entitled action, in which the said Herman Gilbert and Jacob Schaetzel, Jr., were appellants and the said Moline Plow Company was respondent:

Now, therefore, the condition of this obligation is such that if the above-named Herman Gilbert and Jacob Schaetzel, Jr., shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void, else to remain in full force and virtue. 63

H. L. HOLLISTER.
B. F. CAMPBELL.

Sealed and delivered in presence of—
GUY C. WEED.

Territory of Dakota, }
County of Minnehaha, } *ss:*

On this 1st day of November, 1882, before me personally appeared Henry L. Hollister and Benjamin F. Campbell, known to me to be the persons who are described in and who executed the above and foregoing instrument, and severally acknowledged to me that they executed the same.

GUY C. WEED,
Notary Public in & for Dakota.

Territory of Dakota, }
County of Minnehaha, } *ss:*

Henry S. Hollister and Benjamin F. Campbell, being severally sworn, *and* depose and each for himself says that he is a resident and freeholder of the county of Minnehaha, in the Territory of Dakota, and that he is worth in property not exempt from execution the sum of three thousand dollars over and above all his debts and liabilities.

H. L. HOLLISTER.
B. F. CAMPBELL.

Subscribed and sworn to before me this 1st day of November, A. D. 1882.

GUY C. WEED,
Notary Public in and for D. T.

64 I hereby approve the foregoing bond and the sufficiency of the sureties, and the writ of error issued in the above-entitled cause is made a supersedeas.

Dated Nov. 1st, 1882.

A. J. EDGERTON,
Chief Justice.

65 [Endorsed:] U.S. Supreme Court. Herman Gilbert & Jacob Schaetzel, Jr., pl'ff's in error, *vs.* Moline Plow Co., def't in error. Bond. Filed in my office this 20th day of November, 1882. B. S. Williams, clerk.

66 UNITED STATES OF AMERICA, }
Territory of Dakota, } *ss:*

To the honorable justices of the Supreme Court of the United States:

And now come Herman Gilbert and Jacob Schaetzel, Jr., of the Territory of Dakota, by Winsor and Swezy, their attorneys, and complain that in the records and proceedings and also in the rendition of final judgment by the supreme court of the Territory of Dakota in a suit between the Moline Plow Co., respondent, and said Herman Gilbert and Jacob Schaetzel, Jr., appellants, affirming a judgment of the district court of the fourth judicial district of said Territory, in and for Minnehaha county, rendered against them at the April term thereof, A. D. 1882, on the 19th day of April, A. D. 1882, for the sum of twelve hundred and twenty-two dollars and thirty-three —, which judgment upon appeal was at the October term, A. D. 1882, of said supreme court of the Territory of Dakota on the 14th day of October, A. D. 1882, by final judgment of said court affirmed—manifest error hath intervened, to the great damage of said Herman Gilbert and Jacob Schaetzel, Jr.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

WINSOR & SWEZY,
67 *Attorneys for Herman Gilbert and Jacob Schaetzel, Jr.*

The foregoing petition is approved, and the writ of error prayed for therein is allowed this 1st day of November, A. D. 1882.

A. J. EDGERTON,
Chief Justice Supreme Court, Dakota.

68 [Endorsed:] Herman Gilbert *et al. vs.* Moline Plow Co. Petition for writ of error. Filed November 1st, 1882. B. S. Williams, clerk.

69 UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota, }

The President of the United States to the judges of the supreme court of the Territory of Dakota, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said supreme court, bebetween Herman Gilbert and Jacob Schaetzel, Jr., plaintiffs in error, and the Moline Plow Company, defendant in error, affirming a judgment rendered against them in the district court of the fourth judicial district of the Territory of Dakota for Minnehaha county, a manifest error hath happened, to the great damage of the said Herman Gilbert and Jacob Schaetzel, Jr., as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1883, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of November, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 107th year.

[Seal Supreme Court of Dakota Territory.]

B. S. WILLIAMS,
Clerk Supreme Court of Dakota Territory.

70 [Endorsed:] Supreme Court of the United States. Herman Gilbert *et als. vs.* Moline Plow Co. Writ of error. Filed November 1st, 1882. B. S. Williams, clerk.

71 UNITED STATES OF AMERICA, *ss:*

To Moline Plow Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Dakota, wherein Herman Gilbert and Jacob Schaetzel, Jr., are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that half.

Witness the Honorable A. J. Edgerton, chief justice of the said supreme court of the Territory of Dakota, this first day of Novem-

Subscribed and sworn to before me this 1st day of November, A. D. 1882.

GUY C. WEED,
Notary Public in and for D. T.

64 I hereby approve the foregoing bond and the sufficiency of the sureties, and the writ of error issued in the above-entitled cause is made a supersedeas.

Dated Nov. 1st, 1882.

A. J. EDGERTON,
Chief Justice.

65 [Endorsed:] U.S. Supreme Court. Herman Gilbert & Jacob Schaetzel, Jr., pl'ff's in error, *vs.* Moline Plow Co., def't in error. Bond. Filed in my office this 20th day of November, 1882. B. S. Williams, clerk.

66 UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota, }

To the honorable justices of the Supreme Court of the United States:

And now come Herman Gilbert and Jacob Schaetzel, Jr., of the Territory of Dakota, by Winsor and Swezy, their attorneys, and complain that in the records and proceedings and also in the rendition of final judgment by the supreme court of the Territory of Dakota in a suit between the Moline Plow Co., respondent, and said Herman Gilbert and Jacob Schaetzel, Jr., appellants, affirming a judgment of the district court of the fourth judicial district of said Territory, in and for Minnehaha county, rendered against them at the April term thereof, A. D. 1882, on the 19th day of April, A. D. 1882, for the sum of twelve hundred and twenty-two dollars and thirty-three —, which judgment upon appeal was at the October term, A. D. 1882, of said supreme court of the Territory of Dakota on the 14th day of October, A. D. 1882, by final judgment of said court affirmed—manifest error hath intervened, to the great damage of said Herman Gilbert and Jacob Schaetzel, Jr.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

WINSOR & SWEZY,
67 *Attorneys for Herman Gilbert and Jacob Schaetzel, Jr.*

The foregoing petition is approved, and the writ of error prayed for therein is allowed this 1st day of November, A. D. 1882.

A. J. EDGERTON,
Chief Justice Supreme Court, Dakota.

68 [Endorsed:] Herman Gilbert *et al. vs.* Moline Plow Co. Petition for writ of error. Filed November 1st, 1882. B. S. Williams, clerk.

69 UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota, }

The President of the United States to the judges of the supreme court of the Territory of Dakota, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said supreme court, bebetween Herman Gilbert and Jacob Schaetzel, Jr., plaintiffs in error, and the Moline Plow Company, defendant in error, affirming a judgment rendered against them in the district court of the fourth judicial district of the Territory of Dakota for Minnehaha county, a manifest error hath happened, to the great damage of the said Herman Gilbert and Jacob Schaetzel, Jr., as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1883, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of November, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 107th year.

[Seal Supreme Court of Dakota Territory.]

B. S. WILLIAMS,
Clerk Supreme Court of Dakota Territory.

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You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Dakota, wherein Herman Gilbert and Jacob Schaetzel, Jr., are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that half.

Witness the Honorable A. J. Edgerton, chief justice of the said supreme court of the Territory of Dakota, this first day of November, in the year of our Lord one thousand eight hundred and eighty-two.

A. J. EDGERTON,
Chief Justice Supreme Court, Dakota.

Due service of the above citation is hereby admitted this 17th day of November, A. D. 1882.

GRIGSBY AND WILKES,
Att'ys for Defendants in Error.

72 TERRITORY OF DAKOTA, *County of Minnehaha,* } *ss:*

L. S. Swezey, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiffs in error named in the foregoing citation, and that he served said citation upon the defendant in error on Nov. 17th, 1882, by delivering to M. Grigsby, Esq., one of the firm of Grigsby & Wilkes, attorneys for defendant in error, a copy thereof, and taking his admission of service written hereon by his own hand, in Sioux Falls, D. T.

L. S. SWEZEY.

Subscribed and sworn to before me this 18th day of Nov., 1882.

[Seal T. B. McMartin, Notary Public, Dakota.]

T. B. McMARTIN,
Notary Public, Minnehaha Co., D. T.

[Endorsed:] U. S. Supreme Court. Herman Gilbert & Jacob Schaetzel, Jr., pl'ff's in error, *vs.* Moline Plow Co., def't in error. Citation. Filed in my office this 20th day of November, 1882. B. S. Williams, clerk.

73 TERRITORY OF DAKOTA, *County of Minnehaha,* } *ss:*

Lester S. Swezy, being first duly sworn, deposes and says that he is a resident of said county and is one of the attorneys for Herman Gilbert and Jacob Schetzel, Jr., appellants named in a certain action lately pending in the supreme court of the Territory of Dakota, in which the Moline Plow Company was plaintiff and respondent and said Herman Gilbert and Jacob Schaetzel, Jr., were defendants and appellants, wherein at the October term of said court, A. D. 1882, the judgment of the district court was affirmed; that said judgment so affirmed was recovered by said Moline Plow Company against said Herman Gilbert and Jacob Schaetzel, Jr., in the district court for Minnehaha county, Dakota, on the 19th day of April, A. D. 1882, for the sum of $1,222.33, and the same is now in full force and wholly unsatisfied, and that the value and amount of the matter in dispute in said action, exclusive of costs at the time of the rendition of said judgment in said supreme court, exceeds one thousand dollars and is the full sum of said judgment so affirmed as aforesaid.

LESTER S. SWEZY.

Subscribed and sworn to before me this 1st day of November, A. D. 1882.

[SEAL.] GEN. C. WEEL,
Notary Public, &c., for D. T.

74 [Endorsed:] Herman Gilbert *et al.* *vs.* Moline Plow Co. Affidavit. Filed November 1st, 1882. B. S. Williams.

75 *Appeal from the District Court of the County of Minnehaha.*

Supreme Court. October Term, 1882.

Moline Plow Company, Respondent,
vs.
Herman Gilbert *et al.*, Appellants.

Winsor & Swezey, for appellants; Girsby & Wilkes, for respondent.

Kidder, J.:

This action was brought upon a letter of guarantee, which was as follows:

"Sioux Falls, D. T., *March 9th*, 1878.

"Moline Plow Company, Moline, Illinois:

"Sirs: We, the undersigned, are acquainted with Peter Gilman, of this place (formerly of Fon du Lac, Wis.), and have no hesitation in endorsing him as an honest, capable business man and deserving of confidence and credit.

"We think your informant in regard to Mr. Gilman's business ability and capacity was in error, if not selfish and malicious. We will satisfy all orders Mr. Gilman gives this spring, such as plows and cultivators.

"WM. B. DICK.
"H. GILBERT.
"JACOB SCHAETZEL, Jr."

76 Mr. Dick, having deceased, was not made a party. Peter Gilman took this guarantee and enclosed it to the plaintiff in his letter, which reads:

"Sioux Falls, D. T., *Mar.* 9, 1878.

"Moline Plow Co., Moline, Illinois:

"Will you accept my order under the recommend- enclosed? If so, ship me the breakers as ordered; also the cultivators, and about six vibrating harrows. * * * I am sorry about such a report, as stated to you, but still I will try and satisfy you, and I know you will think so much the more of me.

"I remain yours,

"PETER GILMAN.

"If you accept my order please ship the goods at once and oblige.

"P. G."

ber, in the year of our Lord one thousand eight hundred and eighty-two.

A. J. EDGERTON,
Chief Justice Supreme Court, Dakota.

Due service of the above citation is hereby admitted this 17th day of November, A. D. 1882.

GRIGSBY AND WILKES,
Att'ys for Defendants in Error.

72 TERRITORY OF DAKOTA,
County of Minnehaha, } *ss:*

L. S. Swezey, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiffs in error named in the foregoing citation, and that he served said citation upon the defendant in error on Nov. 17th, 1882, by delivering to M. Grigsby, Esq., one of the firm of Grigsby & Wilkes, attorneys for defendant in error, a copy thereof, and taking his admission of service written hereon by his own hand, in Sioux Falls, D. T.

L. S. SWEZEY.

Subscribed and sworn to before me this 18th day of Nov., 1882.

[Seal T. B. McMartin, Notary Public, Dakota.]

T. B. McMARTIN,
Notary Public, Minnehaha Co., D. T.

[Endorsed:] U. S. Supreme Court. Herman Gilbert & Jacob Schaetzel, Jr., pl'ff's in error, *vs.* Moline Plow Co., def't in error. Citation. Filed in my office this 20th day of November, 1882. B. S. Williams, clerk.

73 TERRITORY OF DAKOTA,
County of Minnehaha, } *ss:*

Lester S. Swezy, being first duly sworn, deposes and says that he is a resident of said county and is one of the attorneys for Herman Gilbert and Jacob Schetzel, Jr., appellants named in a certain action lately pending in the supreme court of the Territory of Dakota, in which the Moline Plow Company was plaintiff and respondent and said Herman Gilbert and Jacob Schaetzel, Jr., were defendants and appellants, wherein at the October term of said court, A. D. 1882, the judgment of the district court was affirmed; that said judgment so affirmed was recovered by said Moline Plow Company against said Herman Gilbert and Jacob Schaetzel, Jr., in the district court for Minnehaha county, Dakota, on the 19th day of April, A. D. 1882, for the sum of $1,222.33, and the same is now in full force and wholly unsatisfied, and that the value and amount of the matter in dispute in said action, exclusive of costs at the time of the rendition of said judgment in said supreme court, exceeds one thousand dollars and is the full sum of said judgment so affirmed as aforesaid.

LESTER S. SWEZY.

Subscribed and sworn to before me this 1st day of November, A. D. 1882.

[SEAL.] GEN. C. WEEL,
Notary Public, &c., for D. T.

74 [Endorsed:] Herman Gilbert *et al.* *vs.* Moline Plow Co. Affidavit. Filed November 1st, 1882. B. S. Williams.

75 *Appeal from the District Court of the County of Minnehaha.*

Supreme Court. October Term, 1882.

Moline Plow Company, Respondent,

vs.

Herman Gilbert *et al.*, Appellants.

Winsor & Swezey, for appellants; Girsby & Wilkes, for respondent.

Kidder, J.:

This action was brought upon a letter of guarantee, which was as follows:

"Sioux Falls, D. T., *March 9th*, 1878.

"Moline Plow Company, Moline, Illinois:

"Sirs: We, the undersigned, are acquainted with Peter Gilman, of this place (formerly of Fon du Lac, Wis.), and have no hesitation in endorsing him as an honest, capable business man and deserving of confidence and credit.

"We think your informant in regard to Mr. Gilman'- business ability and capacity was in error, if not selfish and malicious. We will satisfy all orders Mr. Gilman gives this spring, such as plows and cultivators.

"WM. B. DICK.
"H. GILBERT.
"JACOB SCHAETZEL, Jr."

76 Mr. Dick, having deceased, was not made a party. Peter Gilman took this guarantee and enclosed it to the plaintiff in his letter, which reads:

"Sioux Falls, D. T., *Mar.* 9, 1878.

"Moline Plow Co., Moline, Illinois:

"Will you accept my order under the recommend- enclosed? If so, ship me the breakers as ordered; also the cultivators, and about six vibrating harrows. * * * I am sorry about such a report, as stated to you, but still I will try and satisfy you, and I know you will think so much the more of me.

"I remain yours,

"PETER GILMAN.

"If you accept my order please ship the goods at once and oblige.

"P. G."

Thereafter, during the spring of 1878, Gilman gave to the plaintiff four other orders for plows and cultivators, which the plaintiff filled by selling and delivering the same to him at Moline, Ill., to the amount of $1,051.05, upon which there was paid $50.53. The balance is what was sought to — recover-.

Previous to all of which Gilman sent an order to the plaintiff, which is as follows:

"SIOUX FALLS, D. T., *Jan'y 21st*, 1878.

"Moline Plow Co., Moline, Illinois:

"I hereby order of you the plows and other goods in your price-list hereto annexed, to be delivered on board cars at Moline, Illinois, marked Peter Gilman, at prices and terms of warranty annexed, for
which I agree to pay you one-half September 15th, 1878, &
76½ Jan'y 1, '79, with interest at ten per cent. from maturity,
payable at Sioux Falls Bank, Sioux Falls, D. T., exchange or express charges prepaid, account to be settled monthly by note payable as above. * * * All other goods ordered during the season will be on the same terms, and are to be paid for in the same manner. * * * Discount from this list 30 per cent.; ship on or about March 1, 1878, via cheapest route.

"PETER GILMAN.
"M. P. CO.
"Per P. C. FOWLER."

(Here follows schedule of prices.)

This order, after looking up the commercial standing of Mr. Gilman, the plaintiff declined to fill unless Gilman would furnish good security, and this was communicated to Mr. Gilman before March 9th. And there was testimony introduced on the trial below, as the record shows, which tended to prove that said order was "cancelled and laid away *and* dead paper," when the guaranty was received, and there was also testimony which tended to show that it was *in esse* at that time, and that said goods were sold and delivered upon it.

On the 28th of July, 1878, the agent of the plaintiff—without the knowledge or consent of the defendant, or either of them—settled the balance of said account by taking two notes payable to the plaintiff, one for the sum of $550.53, with exchange on New York or express charges, and interest from date at the rate of ten per cent. annually
until paid, payable the 15th day of September, and executed
77 by Peter Gilman and Wm. B. Dick; the other payable the
15th Novembr, 1878, for the sum of $450 (otherwise the same as above.)

Also there was a settlement of same date, signed by Gilman and Fowler, the agent of the plaintiff, as follows:

"Settlement with Peter Gilman, Sioux Falls, Dakota; date, July 28, 1878.

"Account M. P. Co.
"Invoice May 20, '78, $1,051.05.

“ Cr.

“ Bills rec.; date, July 28. ’78.

“ Due Sept. 15, ’78	$550 53
“ Nov. 15, ’78	450 00
“ Cash to balance	50 52

“ Retained, $50.52.

“ PETER GILMAN.
“ MOLINE PLOW CO.,
“ Per P. C. FOWLER.”

There seems to have been no objections to the complaint, which counted on the letter of guaranty and the sale and delivery of the goods to Gilman.

The defendants, in their answer, admit only the writing and sending of the letter, and deny each and every other allegation of the complaint. The answer also sets up that by the agreement under which the goods were purchased certain terms of credit and payment were agreed upon, and that subsequently, without their knowledge, these terms were by the princip*le* parties materially altered, whereby they were exonerated.

The first assignment of error was the admitting in evi-
78 dence upon the trial the letter-press copy of *of* the plaintiff’s
letter of March 14, 1878, which is as follows:

“‘ Peter Gilman, Esq., Sioux Falls, D. T.:

“ Yours of the 9th is at hand and satisfactory. We will ship you goods in a day or so and hope they will arrive promptly.

“ LOBDELL.”

It appears that no foundation was laid for its introduction, and it was objected to upon that ground. The objection was well taken, if the investigation stops here, but this letter was written in reply to Gilman’s letter of March 9th, in which he encloses the defendant’s letter of guarantee of the same date, and enquir*ies*: “ Will you accept my order under the recommend- enclosed? If so, ship me the breakers as ordered, and also the cultivators,” &c. This letter of Gilman’s did not require a reply. The contract between the parties was consummated upon the shipping of the goods. He did not say “ if you accept my order write me.” It was entirely immaterial whether the plaintiff replied to the letter or not. The goods were shipped in response to the letter, and the plaintiff would have been entitled to recover just the same as if no reply had been sent him. We are unable to comprehend in what respect the admission of the copy could affect the recovery or be an injury to the defendants.

In the celebrated *diura* case, Forrest *vs.* Forrest, 27 N. T., 501, the
learned judge, who delivered the opinion of the court, said:
79 “ It was insisted that the same principles upon which a
court of law formerly proceeded in granting or refusing a new
trial should be applied to the case, and if evidence had been rejected
on the trial of the issues that ought to have been received, or evidence received that should have been rejected, the defendant was

entitled to a new trial. This is hardly the rule now in a court of law, for latterly even these courts undertake to judge for themselves of the materiality of the evidence found to have been improperly admitted or rejected, and when satisfied that no injustice has been done, and that the verdict would have been the same with or without such evidence, they have refused a new trial.” He cited Doe *vs.* Tyler, 6 Bing., 561, and other cases, and went on to say: “Courts of equity have, however, been governed by very different principles from those of a court of law in granting or refusing new trials of issues of fact. Though evidence has been improperly admitted or rejected, if a court of equity was satisfied that the verdict ought not to have been different it would not grant a new trial merely on such ground.” He cited Barker *vs.* Bay, 2 Russ., 63, — other cases.

A rule is laid down in the 3 Wait’s Practice 420, sustained by numerous authorities, which we consider as settled, viz: “That
whether the error complained of was the admission of im-
80 proper testimony, or the rejection of that which was proper,
another trial will not be ordered, unless the court, taking the
whole of the evidence together and connecting it with the judge’s charge, thinks that injustice has been done by the error committed.” This is extending the rule further than we are asked to do in the case at bar.

2. Was there error in the ruling out of a portion of the deposition of Chas. W. Lobdell?

The deposition was taken by the plaintiff to be and was used by him on a former trial of this case, and Lobdell was in court, and was a witness, and had testified on the part of the plaintiff in the trial of the case.

The defendants offered interrogatory 11 of said deposition, and the witness answer thereto, which were as follows: “Int. 11. Was there any agreement between the plaintiff and Gilman, or between the plaintiff and defendants, that the time mentioned for payment in the order of Jan. 21, 1878, should govern for any and all sales made during the spring of 1878, under the defendants’ letter of guaranty? If so, state regarding it.

“Ans. As I understood it the terms for the season were stated in the original order “Exhibit A,” and the guaranty was for the same time.

“(Objected to because the answer was not responsive to the question.”)

If this question had been put to a witness upon the stand, and he had answered it in the same manner, it would have at once been stricken out by the court on motion. It is a well-settled doctrine
that a witness cannot testify as to his understand- of a matter,
81 and it is clear that the answer is not responsive to the ques-
tion, although under this objection the court ruled correctly,
yet the proper objection would have been that the witness is here in court, and, therefore, the deposition is not admissible; then it could not have been used only to impeach the witness after the proper foundation *as* been laid.

The deposition of any witness may be used only in the following cases:

1. When the witness does not reside in the county where the action or proceeding is pending * * * or is absent therefrom. "Code of Civil Proc., sec. 469, 479."

[2.] When a deposition is offered to be read in evidence it must appear to the satisfaction of the court that for some cause specified in section 469 of this code the attendance of the witness cannot be procured. Sec. 482.

3. Refusing to submit to the jury special issues as requested is alleged as error.

At the proper time the defendants presented their special issues in writing as follows:

"1. Did the defendants, at the time of giving the letter of guarantee, understand that the orders of Gilman, therein referred to, were to be given and filled on credit; and, if so, upon what terms of credit?

"2. Were the goods ordered by Gilman and sent by the plaintiff upon the terms of credit specified in the order or contract of Jan'y 21st, 1678?

"3. Were the terms of credit agreed upon between the plaintiff and Gilman (if any) changed upon the settlement of July 28,
82 1878, without the consent of the defendants?"

And the defendants asked the court to submit said issues to the jury and instruct them that in their discretion they might render a special verdict upon said issues, or either of them, which the court refused to do.

We could properly avoid deciding the question that is here submitted on the ground of irregularities in the presenting the questions to the court below. The question, as shown by the abstract brought up, it is true, were in writing, but there was no instruction "reduced to writing" (Cod , sec. 248) asking the court to so sub[mit] the issues as required by the code that the judge "might" write on the margin thereof the word "refused" or "given" to indicate whether he approved the same. Hence, we might say, the issues are not before us. Again, there does not seem to have been a *scintilla* of evidence submitted to the jury upon the first issue, and it is evident, on examining the pleadings, that the second, not the third, covered all the issues involved. But as this court has never passed upon the question sought to be submitted, we will waive all technicalities and meet the point squarely. The Code, sec. 261, is as follows: "In an action for the recovery of money only on specifical property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon."

We have reviewed all the authorities that the learned counsel for the defendants relied upon at the bar, and, after careful con-
83 sideration, we find that but one of the cases can be considered as authority upon the question under discussion, and that sustains the position claimed by the plaintiff.

Jones *vs.* The Insurance Co., N. Y., 79, was an action brought upon a policy of life insurance issued by the defendant to the plaintiff upon the life of one Nenning.

When the testimony was closed the court submitted three questions to the jury, stating it would determine the case, except upon those issues. To this submission, in this form, the defendant excepted. There were also other questions not material here. Judgment was for the plaintiff.

The defendant claimed that there was a mistrial or such an irregularity that the judgment should be reversed.

The court, in delivering the opinion, says: "The irregularity complained of consists in the fact that the judge submitted three questions to the jury without their going through the form of finding a verdict, either general or special, and on receiving affirmative answers to two of these questions, which made any finding of the third unnecessary, proceeded to order the entry of judgment. The proceeding was plainly informal, and it is insisted that the irregularity was of such a kind as to amount to a mistrial." The objection was as to the form of the verdict, and the court cited the 176 sec. of the N. Y. Code, the same substantially as ours: "That the court shall, in every stage of an action, disregard any error or defect in the pleadings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of any such error or defect."

84 The Iowa case, Schultz *vs.* Cremer, No. 2, 13 N. W. Rep., 59, was an action for damages for the alleged wrongful conversion of property. The defendant pleaded the general denial. A trial by jury and a special, but not a general, verdict. The court rendered judgment for the plaintiff. The defendant appeals.

The court say: We infer from the record "that the court directed the jury, against the objection of the defendant, to return only a special verdict. A jury may, in their discretion, render a general or special verdict. Code, sec. 2808. They may also, when they render a general verdict, be required to render a special verdict in addition. See sec. above cited. The language is: In any case in which they (the jury) render a general verdict they may be required by the court * * * to find specially upon any particular question of fact to be stated to them in writing. The statute does not authorize the court to require a special verdict, except in addition to a general verdict. The rendition of a special verdict without a general verdict is left solely to the discretion of the jury. * * * But it appears to us that every party has a right to a general verdict if he demands it and the jury sees fit to render it. * * *

"We think the court erred in directing the jury, against the defendants' objections, to render a special verdict only." The judgment was reversed.

The only point in this case was that the court directed the jury, against defendants' objections, to find a special verdict only.

85 Peck *vs.* Snyder, 13 Mich., 21, was an action brought to recover damages for not building a house and barn according to the contract, and was tried by a jury.

The court, in delivering the opinion, says: "I can see but one exception taken below to which our attention can be directed, and that is *to* the refusal of the judge to direct the jury to find specially upon certain questions in case they found a general verdict. This is a novel request. A jury may find a general or special verdict, according to the exigencies of the case, but a judge cannot direct or compel them to do either, and, more particularly, not to give reasons for a general finding."

This, seemingly, is the authority in point.

The jury cannot be required to give a special verdict, although they may give one. 1 Burril's Practice, 242; Tidd's Practice, 897.

It is conseded by the counsel that "in all other cases the court may direct the jury." "This," he says, "undoubtedly makes it discretionary with the court in all such 'other cases,' but excludes the idea of any discretion on the part of the court for the recovery of money only, or specific real property. In these two classes of cases the discretion is solely with the jury. And we submit that the court erred in denying or interfering with the jury." The specific objection to the ruling of the court is that he did not interfere with their discretion. He was asked to submit the issues to the jury
86 and instruct them that in their discretion they might render
a special verdict, which was denied. This was not interfering with their discretion. They were left with the law as it is, without any suggestion or intimation from the court to render, in their discretion, "a general or special verdict."

"And in all cases (the court) may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." This clause of the Sec. (261) covers the first clause for the recovery of "money only, &c." The court, then, in all cases, may instruct them, if they render a general verdict, to find specially. And we agree with the defendant's counsel that it is "discretionary with the court in all such other cases." This being so, it is plain to us that the words "and in all cases" include all the cases mentioned in said section, and therefore the discretion is in the court whether he will so charge or not. It should be so. He sees the points in a case as a trial progresses, and is expected to exercise a reasonable judicial judgment as to how he will present the law to the jury in endeavoring to aid them in the application of the facts thereto. When the testimony is closed he is expected to comprehend the case, and, from his disinterested standpoint, to administer the law in such a manner as will tend to *meet* out such substantial justice to the parties as they
shall respectively seem to merit from the facts therein and
87 the law applicable thereto. It is his duty to charge the jury,
whether requested or not, upon every point material to the decision of the case, upon which there is evidence, and to charge correctly and fully.

In regard to written requests, the court is not bound to regard them in his charge unless they are worded in such language as to be sound to the full extent. The fact that some sound law might be extracted therefrom is not enough. They must be wholly sound law, and without any necessary qualification. Although a party may not be entitled to the particular charge to the jury which he requests, yet it is the duty of the court to charge as the facts in the case require. The court is not required, in a charge to the jury, to answer every request of the parties in the words made use of in the requests; he must instruct the jury correctly as to the law, but may adopt his own language. And when in the charge, on his own motion, he covers the charge requested, he is at liberty to refuse the charge. A substantive proposition of law may be refused unless connected with the case.

As in the case at bar, on looking into the charge of the court, it is discovered that the charge more than covered the issues that were refused; therefore the court would have refused them for that
reason.
88 The code says: "The jury, in their discretion, may render
a general or special verdict." Counsel inquire: "How can they know such is the law unless the court declares it?" It is too late, in this age of intelligence and progression, to make such an enquiry. Men of this generation, who are capable of adapting the elements and things in the natural world to such practical use and benefit, as may everyw-ere be seen, and have made such rapid stridies in improvements in all the departments of life; men who are qualified to instruct in the arts and sciences are capable of contemplating general results without the aid or dictation of the court.

Blackstone, a long time ago, said: "The trial by jury is the palladium of our civil rights."

Our legislative assembly no doubt so thought when it passed the law. Be that as it may, we take up the law as we find it, and our duty only is to construe it.

4. Counsel waives the exceptions to the charge except as to the plaintiff's request number two embraced therein, and in the order to have a proper understanding of this part of the charge we should read the whole paragraph together, which is as follows: "If you believe from the evidence that the plows and cultivators were sold
and delivered to Gilman on the orders of Gilman dated the
89 9th March, 1878, and thereafter, in connection with the letter
of the defendant to the plaintiff, then the plaintiff was authorized by this letter of the 9th of March to hold defendants liable for all the orders of Gilman given in the spring of 1878," (here follows the part excepted to), "and at the expiration of that time plaintiff was at liberty to accept the notes of Gilman & Dick for the goods ordered by him during said spring, and to follow out its usual course of dealing in such cases, and the defendants are not discharged from their obligations imposed by said letter because of such settlement and the taking of such notes."

In this connection, the court further instructed the jury, not excepted to, if you find from the evidence that the order of Gilman on the plaintiff, dated the 21st day of Jan'y, 1878, was the agreement between the plaintiff and Gilman upon which the plows and cultivators were sold and delivered to Gilman; and if you further find from the evidence that by the terms of the agreement of purchase said Gilman was to pay for the goods bought by him, one-half on

Sept. 15th, 1878, and the balance on Jan'y 1st, 1879, with interest at ten per cent. per annum from maturity, and that the accounts for
such goods were to be settled by him monthly by note, pay-
90 able as above mentioned and specified in the order of Jan'y
21st, 1878, and that aftewards, on or about the 28th of July, 1878, upon an accounting and settlement between the plaintiff and said Gilman, said agreement was by the plaintiff, without the consent of the defendants, altered in any respect in the time of payment or in the proportionate part payable in the first payment, or in the matter of interest, then such alteration would exonerate these defendants, and the plaintiff cannot recover in this action," &c.

He further charged that the jury should consider whether the settlement and taking of the notes impaired or suspended the plaintiff's remedy in any respect against Gilman, and, if it did, the defendants were exonerated.

And also, if they found there was any suspension of the plaintiff's remedy without the consent of the defendants, they should find for the defendants.

On examining the record and the whole charge we can see that the prominent issue in the case was whether the goods were sold and delivered on the order of Gilman dated on the 21st Jan'y, 1878, or on his orders of the date of March 9th and afterwards.

It appears to us that the court in his charge placed this
91 issue fairly and squarely before the jury, and they found
for the plaintiff; that is, that the contracts for the sale of the goods were the orders of Gilman of the dates of March 9th, and thereafter, taking the whole charge together, and it should be so construed. We think it is a very fair, correct, and clear exposition of the law applicable to the case.

The jury having found for the plaintiff, thereby ignoring the claim of the defendants that the contract between the plaintiff and Gilman was the one of the 21st of Jan'y, 1878, the question as to the discharge of the defendants from the liability incurred by their letter of guaranty, who defend as guarantors upon the ground of an alteration of the contract by the principal parties without their knowledge or consent, does not now arise; but *quære* whether shortening the time of payment impairs or suspends the remedies or rights of the creditor against the principle in respect thereto. Civil Code, Sec. 1665.

5. Is the evidence sufficient to sustain the verdict?

On reading the testimony in this case, and applying it to the issues made by the parties in the pleadings, we can come to no other conclusion than there is therein a substantial conflict, and this being so the question can hardly be considered an open one here. This court
on two occasions has decided this question. French Nat. *vs.*
92 Lancaster Nahl., 9 N. W. Rep., 716; Caulfield *et al.* *vs.* Bogle,
11 *id.*, 511, and cases therein cited. In the latter case the learned judge who delivered the opinion says: "There was evidence presented to the court below on the trial by both parties bearing upon these questions, and this evidence was more or less conflicting. That court had the opportunity to see the witnesses, to note their appearance and conduct, and could judge of the preponderance of evi-

dence far better than an appellate court not having had such opportunity possibly can. After weighing the evidence in the light of all these circumstances that court made its decision, which was equivalent to a finding of fact. In such cases courts have always hesitated to disturb the verdict of a jury, or the findings of a court, upon a question of fact, the evidence being conflicting, and will not unless great injustice appears to have been done, or there is an entire want of evidence to sustain it."

Such have been the current of decisions in this country unless in some of the States where this subject is controlled by statute.

In Humphrey *vs.* Flavens, 12 Minn., the court says: "It has been repeatedly held in this court, and elsewhere, that, as a general rule, the findings of a jury, a court, or referee, upon a question of fact, will not be disturbed when there is an evidence reasonably tending to sustain it."

93 The federal courts sustain the same doctrine. 8 Wal., 337; 9 Wal., 38.

There seems to be no conflict of authority upon this point, and they must be decisive upon this question.

No error appearing in the record the judgment of the court below is affirmed, all the justices concurring.

94 [Endorsed:] Supreme Court. Oct. term, 1882. Moline Plow Co., respondent, *vs.* Herman Gilbert *et al.*, appellants. Opinion by Kidder, J. Published and filed this 13th day of November, A. D. 1882. B. S. Williams, clerk.

95 IN SUPREME COURT,
Territory of Dakota, } *ss:*

I, B. S Williams, clerk of the supreme court of the Territory of Dakota, do hereby certify that the foregoing pages of manuscript and printed matter are and contain in themselves full, true, and correct copy of the original transcript on appeal from the district court in and for the south judicial district to this court, upon which said cause was heard and determined in this court, of the bill of exceptions as settled and allowed, of the judgment of this court, of the opinion of this court filed in the cause, and of the undertaking on appeal to the supreme court of the United States, the writ of error, with the original citation, issued out of this court, with service thereof duly attached thereto, as the same remains of record in said cause in this court.

In testimony whereof I have hereunto set my hand and attached the seal of said court this 26th day of April, A. D. 1883.

[Seal Supreme Court of Dakota Territory.]

B. S. WILLIAMS, *Clerk.*

96 In the Supreme Court of the United States. October Term, 1883.

Assignment of Errors.

HERMAN GILBERT AND JACOB SCHAETZEL, JR., Plaintiffs in Error.
vs.
THE MOLINE PLOW COMPANY, Defendant in Error.

And now come the said Herman Gilbert and Jacob Schaetzel, Jr., plaintiffs in error, by Winsor & Swezey and H. K. Whiton, Esq., their attorneys and counsel, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The supreme court of the Territory of Dakota erred in not holding that the district court erred in admitting in evidence the letter-press copy of plaintiffs' letter dated March 14th, 1878, to Peter Gilman, and in affirming the ruling of the district court in this behalf.

Second. The said supreme court also erred in not holding that the district court erred in excluding interrogatory No. 11 and the answer thereto, in the deposition of Charles W. Lobdell, offered in evidence by the defendants on the trial, and in affirming the ruling of the district court in this behalf.

Third. The said supreme court also erred in not holding that the district court erred in instructing the jury as contained in the 97 plaintiffs' request No. 1, commencing with the words, "We are to derive the intent," and ending with the close of said request, and in affirming the action of the district court in giving said request.

Fourth. The said supreme court also erred in not holding that the district court erred in instructing the jury as contained in the plaintiffs' request No. 2 (given), and in affirming the action of the district [court] in giving said request.

Fifth. The said supreme court also erred in not holding that the district court erred in instructing the jury as contained in the plaintiffs' request No. 5 (given), and in affirming the action of the district [court] in giving said request.

Sixth. The said supreme court also erred in affirming the ruling of the district court denying the defendant's motion for a new trial.

Seventh. The said supreme court also erred in not holding that the district court erred in not setting aside the verdict as against law

Eighth. The said supreme court also erred in not holding that there was no evidence in the case that the defendants ever guaranteed the indebtedness set forth in the complaint.

Ninth. The said supreme court also erred in affirming the 98 judgment of the district court.

Tenth. And the said supreme court also erred in not reversing the judgment of the district court.

Wherefore the said Herman Gilbert and Jacob Schaetzel, Jr., plaintiffs in error, pray that said judgment of the supreme court of the Territory of Dakota and the judgment of said district court may be reversed, and that speedy justice may be done in the premises.

WINSOR & SWEZEY,
Attorneys for Plaintiffs in Error.

H. K. WHITON,
Counsel for Plaintiffs in Error.

Endorsed on cover: Dakota Territory supreme court. No. 316. Herman Gilbert and Jacob Schartzel, Jr., plaintiffs in error, *vs.* The Moline Plow Company. Filed 1st October, 1883.

119-491

Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court

OF THE

UNITED STATES.

No. 316.

HERMAN GILBERT AND
JACOB SCHAETZEL, Jr.,
Plaintiffs in Error.
vs.
THE MOLINE PLOW COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

H. K. WHITON, Counsel for Plaintiffs in Error.
WINSOR & SWEZEY, Attorneys for Plaintiffs in Error.

Leader Job Print, Sioux Falls, Dak.

IN THE

Supreme Court of the United States.

No. 316.

HERMAN GILBERT AND
JACOB SCHAETZEL, Jr.,
Plaintiffs in Error.

vs.

THE MOLINE PLOW COMPANY,
Defendant in Error.

ABSTRACT OF THE CASE.

(References are to pages of the printed Record.)

COMPLAINT. (*p.* 1.)

The plaintiff for cause of action alleges:

I. That it is a corporation organized under the laws of the State of Illinois.

II. That on or about the 9th, day of March, 1878, at Sioux Falls, Dakota, the defendants, in consideration that the plaintiff, at defendants' request, would fill the orders of one Peter Gilman to be given during the spring of 1878 for plows and other agricultural implements, made and delivered to the plaintiff a certain letter in writing addressed to the plaintiff, in words and figures as follows, to-wit:

Sioux Falls, D. T., March 9, 1878.

Moline Plow Co., Moline, Illinois.

Sirs: We, the undersigned, are acquainted with Peter Gilman of this place (formerly of FonduLac, Wis.), and have no hesitation in endorsing him as an honest, capable business man and deserving of confidence and credit. We think your informant in regard to Mr. Gilman's business ability and capacity was in error; if not selfish and malicious. We will satisfy all orders Mr. Gilman gives this spring, such as plows and cultivators.

Wm. B. Dick.
H. Gilbert.
Jacob Schaetzel, Jr.

III. That during the spring of 1878 the said Peter Gilman gave to plaintiff his five several orders for plows and cultivators, and plaintiff in consideration etc., did on and between the 23rd day of March, 1878, and the 30th day of May of said year fill the orders of the said Peter Gilman for plows and cultivators by selling and delivering to him on credit, at Moline, in the State of Illinois, a large quantity of such plows and cultivators for the sum of $1,051.05 upon which account there has been paid the sum of $50.52.

IV. That by the terms of credit agreed upon between the plaintiff and said Gilman $550.53 of said sum became due and payable on the 15th day of September, 1878, and the remaining $450 thereof on the 15th day of November, 1878, as the same is shown by two promissory notes given therefor and executed by the said Peter Gilman and the defendant William B. Dick; and although the time of payment has elapsed, the said notes have not been paid, nor any part thereof, of all which facts the defendants had notice.

V. The defendants etc. have failed and refused to satisfy the said orders etc., and have not paid the sum of money or any part thereof due plaintiff for said goods, although requested so to do.

Demand for judgment.

ANSWER. (p. 3.)

It appears by the record that the defendant William B. Dick, made no answer and that he died prior to the trial. (p. 16.)

The defendants Herman Gilbert and Jacob Schaetzel, Jr., for answer to the complaint:

I. Deny each and every allegation therein contained not hereinafter admitted.

II. Admit that on or about the 9th day of March, 1878, they with defendant William B. Dick, wrote and sent by mail to the plaintiff at Moline, Illinois, the letter set forth in the complaint.

III. Allege that when the defendants wrote and sent said letter the terms of credit agreed upon between the said Peter Gilman and the plaintiff were that the said Peter Gilman should pay one half of the amount to become payable on the plows and cultivators to be purchased by him of said plaintiff on the 15th day of September, 1878, and one half of said amount on the 1st day of January, 1879.

IV. That at some time unknown to these defendants, and without their consent or knowledge, the plaintiff and said Gilman changed and altered the terms of said credit, and said Peter Gilman together with the defendant, William B. Dick, made and delivered to the plaintiff the two promissory notes mentioned in the complaint whereby $550.53 of the amount due from Gilman to the plaintiff became due and payable on the 15th day of September, 1878, and $450 thereof on the 15th day of November, 1878, the two amounts being the entire indebtedness of Gilman to the plaintiff.

Demand for judgment.

EVIDENCE IN WRITING.

The orders for goods, and letter of guaranty referring thereto, are in writing as follows:

"EXHIBIT A." (p. 10.)

SIOUX FALLS, D. T., Jan'y 21st, 1878.

Moline Plow Company, Moline, Illinois.

GENTLEMEN: I hereby order of you the plows and other goods in your price list hereto annexed, to be delivered on board cars at Moline, Illinois, marked Peter Gilman, at prices and terms of warranty annexed, for which I hereby agree to pay you one-half, September 15th, 1878, and Jan. 1, 1879, with interest at ten per cent. from maturity, payable at Sioux Falls bank, Sioux Falls, Dak., exchange or express charges prepaid. Account to be settled monthly by note, payable as above.

Five per cent. cash discount will be allowed on all payments made within thirty days from date of invoice, but no additional discount will be allowed for payment at maturity.

All other goods ordered during the season will be on the same terms, and are to be paid for in the same manner.

Consignees will look to carriers for loss or damage to goods when same are shipped and receipted for in good order.

No agreement, conditions, or stipulations, verbal or otherwise, save those mentioned in this contract, will be recognized.

The Moline Plow Company reserves the right to withhold shipments of goods to any parties who owe us notes or accounts past due and unsecured.

Discount from this list 30 per cent. Ship on or about March 1st, 1878, via cheapest route.

Peter Gilman.
M. P. Co.,
Per P. E. Fowler.

SCHEDULE ATTACHED.

6 14-inch Western Queen.	$28 00
6 16-inch Western Queen.	32 00
15 vibrating harrows, 45 teeth	13 00
10 Scotch harrows, 40 teeth	11 00
12 double-shovel iron beam	6 50
6 double-shovel wood beam	5 00

Exhibit B. (p. 5.)

Sioux Falls, D. T., March 9th, 1878.

Moline Plow Company, Moline, Illinois.

Sirs: We, the undersigned, are acquainted with Peter Gilman, of this place, (formerly of Fon du Lac, Wis.,) and have no hesitation in endorsing him as an honest, capable business man, and deserving of confidence and credit. We think your informant in regard to Mr. Gilman's business ability and capacity was in error, if not selfish and malicious. We will satisfy all orders Mr. Gilman gives this spring, such as plows and cultivators.

Wm. B. Dick.
H. Gilbert.
Jacob Schaetzel.

Exhibit C. (p. 5.)

Sioux Falls, D. T., March 9th, 1878.

Moline Plow Co., Moline, Ill.

Sir: Will you accept my order under the recommend inclosed; if so, ship me the breakers as ordered, also the cultivators and about 6 vibrating harrows. Hoping we will get better acquainted. I am sorry about such a report as stated to you, but still I will try and satisfy you, and I know you will think so much more of me. (Too late in season for harrows.)

I remain yours, Peter Gilman.

If you accept my order, please ship the goods at once, and oblige.

P. G.

"Exhibit F." (p. 6.)

Sioux Falls, Dakota, March 30th, 1878.

Moline Plow Co., Moline, Ills.

Sirs: Please ship at once 4 12-inch Western Queen breakers; 8 16-inch Western Queen breakers, same as last order and oblige, Yours respectfully,

Peter Gilman.

"Exhibit H." (p. 7.)

Sioux Falls, April 18th, 1878.

Moline Plow Co., Moline, Ills.

Sir: I received the first bill of plows, cultivators and harrows as per bill, all in good condition. I am well satisfied with the plows, and hope they will do good work; only freight is high, $40 71 on the first bill. I hope you will try and get better rates.

Please ship me 6 14-inch Western Queen breakers, besides the last order. I hope you will try and ship them a little faster if not plow trade will be out of season.

Yours truly, Peter Gilman.

"Exhibit J." (p. 7.)

Sioux Falls, May 2, 1878.

Moline Plow Co., Moline, Ills.

I received your last plows, 4 12, 8 16, all in good condition. I sent you one order about ten days ago for 6 14; got no answer as yet. Please ship them at once, for I must have them, and ship me 2 12, 8 16. If you cannot furnish me with my orders please let me know at once, and not ship bills before goods, for that is no good to me, having teams laying over one week and waiting for goods. Truly yours,

PETER GILMAN.

"EXHIBIT K." (p. 7.)

Dated Sioux Falls, D. T.,——24, 1878.

Received Moline, Ills., May 24th, 3:30 p. m.

To Moline Plow Co.:

Can you ship at once to Le Mars, Iowa, one fourteen-inch Evans sulkey I. B.; those western walking cultivators, 12 two-shovel I. B. cultivators. Answer.

P. GILMAN.

The settlement with Gilman on July 28th, 1878, and notes taken thereon are also in writing as follows: (p. 8.)

Settlement with Mr. Peter Gilman, Sioux Falls, Dakota. Date, July 28, 1878.

Account M. P. Co. Invoice, May 20, 1878, $1,051.05.

	Cr.
Bills received; date, July 28, '78:	
Due September 15th, 1878,	$550.53
Due November 15th, 1878,	450.00
Cash in balance,	50.52

Retained $50.52.

PETER GILMAN,
MOLINE PLOW CO.,
Per P. C. FOWLER, Agent.

$550.53. SIOUX FALLS, Dakota, July 28th, 1878.

September 15th, after date for value received we promise to pay to the order of the Moline Plow Company five hundred and fifty and 53-100 dollars payable at Sioux Falls bank, Sioux Falls, D. T., with exchange on New York or express charges, and interest from date at the rate of ten per cent. annually until paid.

If this note is placed in attorney's hands for collection I agree to pay expenses of collection including reasonable attorney's fees.

No. 7,377. **Peter Gilman.**
Wm. B. Dick.

$450. Sioux Falls, Dakota, July 28th, 1878.

November 15th, after date for value received we promise to pay to the order of the Moline Plow Company four hundred and fifty dollars. (Otherwise same as above.)

No. 7,378. **Peter Gilman.**
Wm. B. Dick.

PLAINTIFFS' EVIDENCE.

Charles W. Lobdell, called as a witness for the plaintiff testifies: (p. 5.)

My name is Charles W. Lobdell; age 48 years; I reside at Moline, Illinois; resided there in 1878 and 1879; I was then secretary and business manager of the Moline Plow Company; am not now in any manner connected with the company.

Witness identifies letters, "Exhibit B." and "Exhibit C." above.

EXCEPTION TO EVIDENCE. (p. 6.)

Witness: After these letters were received I wrote a letter acknowledging the receipt.

Q.—Examine and see if that is the letter?

A.—Yes, sir; that is a press copy of the letter.

Q.—Have you the original letter with you?

A.—I have not.

Q.—What did you do with the original letter?

A.—That was sent to Gilman; have never had it since.

Plaintiff's counsel offer in evidence the copy made in the letter book of the plaintiff.

To its introduction defendants' attorneys object upon the ground that the copy is secondary evidence, and no foundation has been laid for such evidence.

Objection overruled by the court, and to this ruling defendants then and there duly excepted.

The copy was read in evidence as follows:

3—14

Peter Gilman, Esq., Sioux Falls, Dakota.

Yours of the 9th is at hand and satisfactory. We will ship your goods in a day or so, and hope they will arrive promptly.

LOBDELL.

Witness identifies letters, "Exhibit F," "Exhibit H," "Exhibit J," and "Exhibit K," above, and gives testimony tending to show that the goods ordered by Gilman were sent by the company in pursuance of the orders.

As to the settlement with Gilman and notes taken thereon on July 28th, 1878, the witness testifies:

I know what that paper is (shown paper and notes). The signature was made by an agent of our company.

These notes were taken upon that settlement. A blank is furnished our traveling agents to report their business when out on their trips. This is a statement by Fowler, our agent, of his settlement with Gilman. The notes accompanied the statement. They have not been paid.

Neither Schaetzel or Gilbert has ever in any manner satisfied the orders made by Gilman, as I have detailed.

DEFENDANTS' EVIDENCE.

The defendant's offered and read in evidence the deposition of A. L. Corson, June 5th, 1879, on behalf of the plaintiff, and used on the former trial, as follows: (p. 10.)

My name is A. L. Corson; age 38 years; am secretary of the Moline Plow Company. Have been in the office of the Moline Plow Company for seven years past. Have no personal acquaintance with the defendants or Peter Gilman, but have corresponded with Gilman in relation to business matters for said company in the year 1878.

"Exhibit A" is the original order sent to the plaintiff by an agent, Mr. Fowler.

After looking up the commercial standing of Mr. Gilman, the company declined to fill the order unless he could furnish good and sufficient security, and this was done by a letter written by my instructions to Mr. Gilman, to which he replied under date of March 9th, 1878, inclosing the letter of credit signed by William B. Dick, H. Gilbert and Jacob Schaetzel, Jr., attached hereto and marked "Exhibit B." (Same as in complaint set forth and "Exhibit B" above.)

I have no personal knowledge, but the records of the office show that it was received accompanied by a letter of Peter Gilman of even date, and was accepted as security on Mr. Gilman's contract Jan. 21st, 1878, marked "Exhibit A," and on the faith of which the order was filled.

As far as I know there was no agreement or contract for payment for goods furnished to Gilman in 1878 other than that mentioned in the original order dated Jan'y 21st, 1878, and which the letter of credit secured, it being the custom of plaintiff to fill all orders during the season under the terms of the original contract or order, and which is especially mentioned in the printed part thereof. * * *

To my personal knowledge there was no specific agreement except the conditions mentioned in the order of Jan'y 21st, 1878, under which all subsequent shipments were made, and the records of the office show no other agreement. The order of Peter Gilman, dated January 21st, 1878, was the contract for goods to be furnished him as specified in said order and also all subsequent orders during the spring of 1878, and the letter of guaranty of defendants was accepted as security for all goods furnished under said order or contract.

The defendants also offered and read in evidence from the deposition of Charles W. Lobdell, taken June 7th, 1879, on behalf of the plaintiff, and used on the former trial, as follows: (p. 13.)

I have examined "Exhibit A" mentioned, I know it was received by the Moline Plow Company and that on account of the reported commercial standing of said Peter Gilman the plaintiff declined to fill the order, afterwards on account of the receipt of a certain guaranty signed by William B. Dick and Gilbert and Jacob Schaetzel, Jr., the Moline Plow Company decided to fill the order, and did so. * * *

Q—12. What relation, if any, did the said Gilman order of Jan'y 21st, 1878, bear to the transactions made with the said Gilman after receiving the defendants' letter of guaranty?

A.—It, in connection with the guaranty, constituted the contract upon which goods were sent; that is my understanding of it.

EXCEPTION TO EXCLUSION OF EVIDENCE. (*p.* 14.)

And defendants in the same connection offered in evidence interrogatory 11, and the answer thereto, as follows:

Q.—11. Was there any agreement between the plaintiff and said Gilman, or between plaintiff and said defendants, that the time mentioned for payment in said Peter Gilman's order of Jan'y 21st, 1878, should govern for any and all the sales made during the spring of 1878, under the defendants' letter of guaranty of March 9th, 1878? If so, state regarding it.

A.—As I understood it, the terms for the season were stated in the original order "Exhibit A," attached to commission, and the guaranty was for the same time.

To which plaintiff's counsel on trial orally objected on the ground that the answer is not *responsive* to the question.

The objection was sustained by the court and this testimony excluded, to which ruling the defendants then and there duly excepted.

Peter Gilman, called as a witness for the defendants, testifies: (p. 14.)

I have seen this paper before (shown "Exhibit A"). That is my signature. The last time I saw that paper was when we settled up for the goods in July, 1878, Mr. Fowler had that paper and I had another one, Mr. Dick and William Mason were present when we settled. We settled up for all the goods I had had from the company for the season amounting, I think, to $1,050.00. I paid him $50 in cash and gave the notes of myself and Dick for the balance. These are the notes (notes in evidence.) *

When we settled with the gentleman in July we had nothing before us but this contract and the bills of the goods shipped me, settled up by this contract. There were two of them signed by me and Fowler, one kept by me and one they kept. The one they kept is the one we had before us at the time we settled. This is the one they settled by, prices and everything.

William Mason, called as a witness for the defendants, gives testimony tending to corroborate that of Gilman. (p. 15.)

Jacob Schaetzel, Jr., one of the defendants, was called as a witness, and testifies that he had no knowledge or notice of the settlement with Gilman or the taking of the notes. (p. 15.)

Herman Gilbert, the other defendant, was called as a witness and testifies that he had no notice of the settlement in July, 1878, between Fowler and Gilman, and never consented to any such settlement. (p. 16.)

EVIDENCE IN REBUTTAL.

Charles W. Lobdell, recalled as a witness testifies as follows: (p. 16.)

(In explanation of witness' answer to interrogatory 12 in his deposition above.)

I suppose the contract of Jan'y 21st. was cancelled and was laid away with the papers in the case. It was brought out when the goods were shipped. It was used for specifying the kind of breakers and prices. We had no other *data* to go by when we received Gilman's order March 9th. There was some goods in the March order not in the order of Jan'y 21st. We filled both from the March order and the one before.

EXCEPTIONS TO INSTRUCTIONS TO THE JURY.

The court after stating the nature of the action, and reading the letter of guaranty, instructed the jury as follows:

I. We are to derive the intent of the guarantors from the words used. They may specify exactly the terms upon which they will be bound, and rely strictly upon the agreement, but they are to be held to the full extent of this and the words of a guaranty will be taken as strongly against guarantors as the sense will admit. So I instruct you, first, that this letter prescribes no mode of credit to be given, nor any terms of credit, and does not limit the amount thereof. It is not even a proposition to become surety for Gilman, but an absolute undertaking to pay for the goods if he did not. "We will satisfy all orders Mr. Gilman gives this spring, such as plows and cultivators," is their language, and the term to satisfy, as here used, I construe to mean to make payment or to pay to the extent of the claim. The undertaking of the defendants is absolute and unconditional, and in pursuance of its terms the plaintiff was authorized to fill the orders of Gilman, given during the spring of 1878, to any extent and upon any terms that might subsequently be agreed upon, or, if no terms were agreed upon, then plaintiff might have dealt with Gilman in accordance with its ordinary custom and usage, and for all such orders defendants are liable.

To which instruction the defendants then and there duly excepted. (p. 19.)

And the court further and in the same connection instructed the jury as follows:

II. If you believe from the evidence that the plows and cultivators were sold and delivered to Gilman on the orders of Gilman, dated the 9th of March, 1878, and thereafter, in connection with the letter of the defendants to the plaintiff, then the plaintiff was authorized by this letter of the 9th of March to hold defendants liable for all the orders of Gilman given in the spring of 1878, and at the expiration of that time plaintiff was at liberty to accept the notes of Gilman & Dick for the goods ordered by him during said spring and to follow out its usual course of dealing in such cases, and the defendants are not discharged from their obligation imposed by said letter because of such settlement and the taking of such notes.

To which instruction also the defendants then and there duly excepted. (p. 19.)

VERDICT.

On April 13th, 1882, the jury returned a verdict for the plaintiff assessing the damages at $1,208.13. (p. 4.)

EXCEPTION ON MOTION FOR NEW TRIAL.

On April 21st, 1882, within the time of the statute, the defendants duly made a motion for a new trial upon the grounds (among others) following, towit: (p. 19.)

I. The verdict is against law.

II. The evidence is insufficient to sustain the verdict—

(1.) In that, by the terms of credit agreed upon between the plaintiff and Gilman as alleged in the complaint, $550.53 became due September 15, 1878, and the remaining $450.00 on Nov. 15, 1878, while the proof shows that by the terms of credit actually agreed upon between said parties one-half of the whole amount became due Sept. 15, 1878, and the other half January 1st, 1879.

(2.) In that the evidence shows that the orders of Gilman mentioned in the defendants' letter of guaranty were given by Gilman and accepted by the plaintiff upon terms of credit by which one-half of the amount of said orders became due Sept. 15, 1878, and the other half Jan. 1st, 1879, with interest at ten per cent after maturity, and that subsequently, on July 28, 1878, said terms of credit were altered by agreement between the plaintiff's agent and Gilman, without the consent of these defendants whereby the terms of credit were made $550.53 due Sept. 15, 1878, and $450 due Nov. 15, 1878, with interest on both of said sums at ten per cent. from July 28, 1878.

III. Errors in law occurring at the trial:

(1.) Error in admitting in evidence upon the trial the letter-press copy of plaintiff's letter to Gilman, dated March 14, 1878.

(2.) Error in refusing to allow the 11th interrogatory and the answer thereto in the deposition of Chas. W. Lobdell.

(3.) Error in giving that portion of the plaintiff's first instruction commencing "we are to derive intent" to the end of the instruction.

(4.) Error in giving the plaintiff's second instruction.

The motion was overruled by the court *pro forma*, and the defendants then and there duly excepted to such ruling. (p. 21.)

This exception and all the other exceptions set forth in the foregoing abstract of the case, are assigned as error upon the appeal to the supreme court of the territory. (p. 22.)

On that appeal the judgment of the district court is affirmed (p. 24.)

The bill of exceptions contains "all the evidence introduced or offered by either party on the trial." (p. 16.)

II.

ASSIGNMENT OF ERRORS. (p. 39.)

In this court the errors assigned by the plaintiffs in error. (defendants below) and relied upon here are in substance as follows:

First.—The supreme court of the territory erred in affirming the ruling of the district court in admitting in evidence the letter-press copy of the plaintiff's letter dated March 14th, 1878. to Peter Gilman, towit:

3—14.

"Peter Gilman, Esq., Sioux Falls, D. T.

"Yours of the 9th is at hand, and satisfactory. We will ship "your goods in a day or so, and hope they will arrive promptly."

"LOBDELL."

Second.—The supreme court erred in affirming the ruling of the district court in the rejection of interrogatory 11 and the answer thereto in the deposition of Charles W. Lobdell (secretary and business manager of the plaintiff corporation in 1878) towit:

"Question 11.—Was there any agreement between the plaintiff and said Gilman, or between plaintiff and said defendants "that the time mentioned for payment in said Peter Gilman's "order of Jan'y 21st, 1878, should govern for any and all the "sales made during the spring of 1878, under the defendants' "letter of guaranty of March 9th, 1878? If so, state regarding it."

"Answer.—As I understood it, the terms for the season were "stated in the original order 'Exhibit A' attached to commission, "and the guaranty was for the same time."

Third.—The supreme court erred in affirming the action of the district court in giving the portion of the instruction (plaintiff's request No. 1) to the jury, to which exception was taken, towit:

(1.) "We are to derive the intent of the guarantors from the "words used, they may specify exactly the terms upon which they "will be bound, and rely strictly upon the agreement, but they "are to be held to the full extent of this and the words of a guar- "anty will be taken as strongly against guarantors as the sense "will admit. So I instruct you first that this letter prescribes no "mode of credit to be given, nor any terms of credit and does "not limit the amount thereof. It is not even a proposition to "become surety for Gilman, but an absolute undertaking to pay "for the goods if he did not. 'We will satisfy all orders Mr. "Gilman gives this spring, such as plows and cultivators' is the "language, and the term to satisfy, as here used, I construe to "mean to make payment, or to pay to the extent of the claim. "The undertaking of the defendants is absolute and uncondi- "tional, and in pursuance of its terms the plaintiff was authorized "to fill the orders of Gilman given during the spring of 1878, to "any extent and upon any terms that might subsequently be "agreed upon, or if no terms were agreed upon, then plaintiff "might have dealt with Gilman in accordance with its ordinary "custom and usage and for all such orders defendants are liable."

Fourth.—The supreme court erred in affirming the action of the district court in giving the instruction (plaintiff's request No. 2) to the jury, to which exception was taken, towit:

(2.) "If you believe from the evidence that the plows and "cultivators were sold and delivered to Gilman on the orders of "Gilman dated the 9th of March, 1878, and thereafter, in connec- "tion with the letter of the defendants to the plaintiff, then the "plaintiff was authorized by this letter of the 9th of March to "hold the defendants liable for all the orders of Gilman given in "the spring of 1878; and at the expiration of that time, plaintiff "was at liberty to accept the notes of Gilman & Dick for the "goods ordered by him during said spring, and to follow out its "usual course of dealing in such cases, and the defendants are "not discharged from their obligation imposed by said letter be- "cause of such settlement and the taking of such notes"

* * *

Sixth.—The supreme court erred in affirming the ruling of the district court in denying defendants motion for a new trial. (Same set forth at length herein above p. 13)

Seventh.—The supreme court erred in affirming the ruling of the district court in refusing to set aside the verdict as against law.

Eighth.—The supreme court erred in not holding that the evidence is insufficient to sustain the verdict in the particulars specified in the motion for a new trial and that there is a failure of proof.

Ninth.—The supreme court erred in affirming the judgment of the district court.

III.

BRIEF.

I. It is first assigned for error that the court erred in admitting in evidence the letter-press copy of plaintiff's letter of March 14, 1878, to Peter Gilman.

The exception is shown in the foregoing abstract, page 8. It was objected to upon the proper ground as being secondary evidence and no foundation was laid for its introduction. Its admission therefore was manifest error.

Wharton on the Law of Evidence, Secs. 93, 133.
Foot vs. Bentley, 44 N. Y. 166.
King vs. Worthington, 73 Ill. 161.
Delaney vs. Errickson, 10 Neb. 492. (35 Am. Rep. 487.)
Marsh vs. Hand, 35 Md. 123.
Watkins vs. Payne, 57 Ga. 50.
See also Goodrich vs. Weston, 102 Mass. 362.
1 Greenleaf Ev. Sec. 82—note (a) 14 Ed.

If the court is called upon to consider the materiality of this evidence, it will appear that it is the letter by which the plaintiff, upon receipt of the guaranty, accepts Gilman's order for goods then in its hands, approves the security and closes the agreement of sale with Gilman; and it is the only letter ever passed from the company to Gilman so far as the evidence discloses.

The answer admits only the writing and sending of the letter of guaranty, and *denies* each and every allegation of the complaint. Under this denial it was incumbent upon the plaintiff to prove on the trial the principal contract with Gilman, the sale and delivery of the plows and cultivators, the price, the amount and the terms of payment. As pleaded this was an express contract, and not an implied contract.

As the first step in the case the plaintiff introduces Gilman's letter of March 9th, inclosing the letter of guaranty of the same date, and containing the inquiry: "Will you accept *my order* under the *recommend* inclosed? If so, ship me the goods." "My order" must refer to the one of January 21st, 1878, taken by P. E. Fowler, signed by both parties, then in the hands of the company awaiting the security which was to be furnished. And this order stated the terms of sale for the season (the spring of 1878).

As the next link in the chain of evidence the plaintiff is permitted to introduce a letter-press copy of its letter in reply: "Yours of the 9th is at hand and satisfactory. We will ship your goods in a day or so, and hope they will arrive promptly."

The parties never met until July 28th, 1878, after the season for the sale of such implements had closed, when the plaintiff's agent made the settlement, signed by both parties and took the two notes of Gilman & Dick in evidence. This letter then closed the negotiations then pending in which the former order, containing the prices and terms of credit, was accepted, the security pronounced satisfactory and the bargain between the *principal parties* closed.

The evidence was therefore material.

II. On the trial the defendants offered in evidence without objection portions of the deposition of Charles W. Lobdell, the secretary of the company in 1878, when the transaction in question was had, and made him to this extent a witness in their behalf. The 11th interrogatory and answer were excluded by the court upon the objection that the answer is not *responsive* to the question. Exception was taken to this ruling. We submit the exclusion of this testimony was error.

In the original order are found the only terms of credit ever agreed upon or mentioned by the parties—one-half September 15th, 1878, and the other half January 1st, 1879,—the same terms pleaded by the defendants, and proved by all the evidence on the question in the case. These terms were necessarily the only terms to which the guaranty could refer. The collateral contract of guaranty only embraces the terms of the principal contract, whatever they may be in fact.

The witness' attention is here called to this original order "Exhibit A," and he is asked whether there was any agreement between the plaintiff corporation and Gilman that these terms of credit should govern as to all *subsequent sales*, and if so, to state regarding it. The witness was familiar with the order. Testifies it was received by the company while he was acting as its secretary and manager, was at first declined on account of Gilman's standing, and then upon receipt of the guaranty accepted and filled, and testifies to *four* subsequent orders during the same spring, which the company had also filled.

His answer is in substance that this original order stated the terms for the entire season—in other words, that there was no other agreement, no other time of payment, and that the guaranty (defendants' contract) was for the same time. This was his understanding when he shipped the goods. His answer was a concise and precise answer to the question. It was in effect: The time of payment for *all sales* during the season, as agreed upon between the plaintiff and Gilman, was, one-half September 15, 1878, and one-half January 1st, 1879, and the undertaking of guaranty by the defendants was for the same time. The question was framed by plaintiff's own counsel, when they were trying this case upon the theory that the order of January 21st, 1878, contained the terms of the contract which plaintiffs in error guaranteed, and the answer is that of the company's managing agent, when he was trying to tell the truth regardless of theories which have since been abandoned. We insist the answer is entirely responsive, and material to the defense pleaded.

When an objection to evidence is specified, all others are deemed waived.

Evanston vs. Gunn, 9 Otto 660.

III. The third and fourth errors assigned relate to the instructions given to the jury to which exceptions were taken, and may well be considered together.

The court after certain preliminary remarks reads to the jury the letter of guaranty, and proceeds at once to declare the liability of the guarantors and the rights of the plaintiff, in terms which we contend are not correct law in this case.

The law of guaranty in this territory is the same as the common law of this country. Section 1649 of the Civil Code of Dakota reads as follows:

"A guaranty is a promise to answer for the debt, default or miscarriage of another person."

This is in substance the same as defined by Brandt in the opening sentence of his work on Suretyship and Guaranty: "A surety or guarantor, is one who becomes responsible for the debt, default or miscarriage of another person." Sec. 1, Sec. 40.

It results from the nature of the obligation of guaranty that it is secondary and collateral to the obligation on the part of the principal. It implies that there is a debt or obligation "of another person."

As Brandt states it: "There must at the time the promise is made, be an actual primary liability of a principal to the promisee, which continues after the making of the promise, or there must be *contemplated*, as the basis of such promise, the future primary liability of a principal. The foundation of the contract of suretyship and guaranty, is the primary liability of another." Sec. 41.

A guaranty being thus a collateral obligation, founded on the primary liability of another, must in its terms and conditions so far as the same are not expressed in the writing, be governed and limited by those contained in the principal contract.

In the case at bar the letter of credit itself does not specify the terms of credit and payment upon which the goods are to be sold, and therefore must refer to the terms agreed upon between the principal parties. The court had before it, however, abundant and undisputed proof that the terms of credit were those contained in the original order signed on January 21st, 1878, by both parties, and in the hands of the plaintiff at the time of writing the letter of guaranty. To these terms the guaranty must refer.

The letter upon its face shows that the writers were informed of the difficulty, which Gilman had encountered on account of reports as to his standing, and that security was required, and is not only a guaranty in its closing words, but a letter of recommendation as to Gilman's honesty and business ability. The guaranty is of "all orders Mr. Gilman gives this spring" for plows and cultivators.

It is conceded that these goods were to be sold *on credit.* Indeed both parties *plead* "the terms of credit agreed upon by and between plaintiff and said Gilman," (quoting from the complaint) the plaintiff, that these terms were $550.53 payable on September 15th, 1878, and the balance $450.00 on *November* 15*th*, 1878, as shown by the two notes of Gilman & Dick in evidence representing the indebtedness; the defendants, that said terms were *one-half* payable on September 15th, 1878, and the other half on *January* 1*st*, 1879, as specified in the original order signed by the parties.

The entire evidence, as we claim, certainly abundant and conclusive evidence, then before the court and jury, shows that the terms of credit agreed upon between the principal parties were in fact as pleaded by the plaintiffs in error (defendants below). It is abundantly proven that on January 21st, 1878, the plaintiff by its agent Fowler and Gilman entered into a written contract for the entire season, specifying the prices, terms of credit and manner of payment, and declaring that "all other goods ordered during the season will be on the same terms, and are to be paid for in the same manner," that upon receipt of the guaranty this contract was made the basis of all future orders, that both parties acted upon its terms during the whole season and that it was produced by the company on the settlement of July 28, 1878, and made the basis of that settlement.

It is fully proved by the testimony of Lobdell and Carson, officers of the plaintiff, that the terms of this contract were the only terms agreed upon by the company and Gilman upon which the goods were shipped. It is proved beyond all controversy that upon the settlement these terms were changed both in *the amount of the payment and the time of the last payment*, and these notes taken for the same. And it is conceded that these defendants were entirely ignorant of the matters occurring on settlement.

This being the case, the instructions in question were, we think, erroneous and misleading.

Observe the opening statements in the first instruction: "We are to derive the intent of the guarantors from the *words* used; they may specify *exactly the terms* upon which they will be bound, * * * but they are to be held to the full extent of this, and the *words* of a guaranty will be taken as strongly against guarantors as the sense will admit."

What, the mere words; the exact terms; and these taken against the guarantors as strongly as the sense will admit, without reference to the terms of the primary contract or the other circumstances of the case? And this too, in a case where the written guaranty does not purport to contain the terms of credit agreed upon, concerning which the main issue is made by the pleadings, and upon which issue the evidence is so abundant and convincing?

The court, possessed with this feature of the writing that it prescribes no mode of credit to be given, nor any terms of credit, then instructs the jury that it is "an absolute undertaking to pay for the goods, if he (Gilman) did not." And referring to the language of the guaranty, the court further charges that "the plaintiff was authorized to fill the orders of Gilman given during the spring of 1878, to any extent, and *upon any terms* that might subsequently be agreed upon, or if no terms were agreed upon, then plaintiff might have dealt with Gilman in accordance with its ordinary custom and usage, and for all such orders defendants are liable."

This we suggest is going beyond the scope of the case made by the pleadings, and leaves the jury to disregard the evidence as to the terms of credit agreed upon by the principal parties, to which the guaranty must refer.

reports as to his standing, and that security was required, and is not only a guaranty in its closing words, but a letter of recommendation as to Gilman's honesty and business ability. The guaranty is of "all orders Mr. Gilman gives this spring" for plows and cultivators.

It is conceded that these goods were to be sold *on credit*. Indeed both parties *plead* "the terms of credit agreed upon by and between plaintiff and said Gilman," (quoting from the complaint) the plaintiff, that these terms were $550.53 payable on September 15th, 1878, and the balance $450.00 on *November 15th*, 1878, as shown by the two notes of Gilman & Dick in evidence representing the indebtedness; the defendants, that said terms were *one-half* payable on September 15th, 1878, and the other half on *January 1st*, 1879, as specified in the original order signed by the parties.

The entire evidence, as we claim, certainly abundant and conclusive evidence, then before the court and jury, shows that the terms of credit agreed upon between the principal parties were in fact as pleaded by the plaintiffs in error (defendants below). It is abundantly proven that on January 21st, 1878, the plaintiff by its agent Fowler and Gilman entered into a written contract for the entire season, specifying the prices, terms of credit and manner of payment, and declaring that "all other goods ordered during the season will be on the same terms, and are to be paid for in the same manner," that upon receipt of the guaranty this contract was made the basis of all future orders, that both parties acted upon its terms during the whole season and that it was produced by the company on the settlement of July 28, 1878, and made the basis of that settlement.

It is fully proved by the testimony of Lobdell and Carson, officers of the plaintiff, that the terms of this contract were the only terms agreed upon by the company and Gilman upon which the goods were shipped. It is proved beyond all controversy that upon the settlement these terms were changed both in *the amount of the payment and the time of the last payment*, and these notes taken for the same. And it is conceded that these defendants were entirely ignorant of the matters occurring on settlement.

This being the case, the instructions in question were, we think, erroneous and misleading.

Observe the opening statements in the first instruction: "We are to derive the intent of the guarantors from the *words* used; they may specify *exactly the terms* upon which they will be bound, * * * but they are to be held to the full extent of this, and the *words* of a guaranty will be taken as strongly against guarantors as the sense will admit."

What, the mere words; the exact terms; and these taken against the guarantors as strongly as the sense will admit, without reference to the terms of the primary contract or the other circumstances of the case? And this too, in a case where the written guaranty does not purport to contain the terms of credit agreed upon, concerning which the main issue is made by the pleadings, and upon which issue the evidence is so abundant and convincing?

The court, possessed with this feature of the writing that it prescribes no mode of credit to be given, nor any terms of credit, then instructs the jury that it is "an absolute undertaking to pay for the goods, if he (Gilman) did not." And referring to the language of the guaranty, the court further charges that "the plaintiff was authorized to fill the orders of Gilman given during the spring of 1878, to any extent, and *upon any terms* that might subsequently be agreed upon, or if no terms were agreed upon, then plaintiff might have dealt with Gilman in accordance with its ordinary custom and usage, and for all such orders defendants are liable."

This we suggest is going beyond the scope of the case made by the pleadings, and leaves the jury to disregard the evidence as to the terms of credit agreed upon by the principal parties, to which the guaranty must refer.

It in effect submits to the jury also a question whether any terms of credit were ever agreed upon, and advises them if none were agreed upon, which is contrary to plaintiff's pleadings, the plaintiff might deal with Gilman according to *its* own ordinary *custom and usage*, of which we believe there is no proof whatever, and hold these defendants liable for such a transaction.

This is going beyond the law of such a case and would tend to mislead a jury.

So far the instruction is upon the interpretation of the guaranty and the *liability* of the guarantors thereon. The court then proceeds to instruct the jury on the further question as to the *discharge* of the guarantors in such a case from liability, in the second request on the part of the plaintiff, to which exception was taken. In substance and effect it is charged that if the jury find from the evidence that the goods were sold to Gilman on his orders, dated March 9th, 1878, and thereafter, and the letter of the defendants to the plaintiff, then the plaintiff could hold them liable for all such orders given in the spring of 1878; "and at the expiration of that time, plaintiff was at liberty to accept the notes of Gilman & Dick for the goods ordered by him during said spring, and to follow out *its usual course of dealing in such cases*, and *the defendants are not discharged from their obligation* imposed by said letter because of such settlement and the taking of such notes."

In other words, after the season's sales had closed, the plaintiff could send out its agent, as it did in this case, and without any regards to the terms of credit and payment agreed and acted upon by the principal parties, make a settlement with the principal debtor according to "its usual course of dealing in such cases," and accept the notes of Gilman & Dick (a recent partner) for the purchase price, and not exonerate the guarantors.

We submit that this is not the law applicable to these guarantors, who defend upon the ground of an alteration of the contract by the principal parties without their knowledge or consent, who say we guaranteed no such indebtedness, we are not parties to any such contract.

And in this connection we are confident we may say there is no evidence in this record that any other terms of credit *than two equal payments* were ever agreed upon by the parties, or ever mentioned or heard of by any party or by any witness in case, until the settlement of July 28th, 1878, which was long after the season named in the guaranty had expired, and not a particle of evidence in this record that *one of the payments was to fall* due *on Nov.* 15, 1878, as mentioned in the last note. It is conceded that the defendants did not guarantee these notes, or know anything of their execution. It is conceded that in these notes for the first time, in these notes *alone*, appear these *unequal payments* of this indebtedness, and one of them in *November*. It is conceded that these defendants were not parties to any such transaction. Where is there any evidence to connect them with *such* an indebtedness—payable in such sums and at such times? And this is the indebtedness which the plaintiff sets up in its complaint, and seeks to recover from these defendants. But the plaintiff cannot recover upon allegations without proof, for the answer denies such a claim. And no proof was given on the trial to connect anyone with such an indebtedness, except Gilman & Dick, and them only upon the settlement of July 28, 1878, to which defendants were not parties.

The authorities applicable to the case at bar, and most directly in point, are the following:

Brandt on Suretyship, Secs. 338, 345, and cases cited holding that any variation or departure from the terms embraced in the guaranty, or any alteration of such terms without his consent, exonerates the guarantor from all liability.

Walrath vs. Thompson, 6 Hill 540.

Leeds vs. Dunn, 10 N. Y. 469.

Bethune vs. Dozier, 10 Ga. 235.

Locke vs. McVean, 33 Mich. 473.

Brandt, Secs. 78, 142—43, and cases cited holding that the liability of a guarantor is determined and limited by the terms, of the principal contract and "the circumstances of the case."

Walrath vs. Thompson, 4 Hill 200.
Agawam Bank vs. Stever, 18 N. Y. 502.
Evansville Bank vs. Kaufmann, 93 N. Y. 273.
Belloni vs. Freeborn, 63 N. Y. 383.
Springsteen vs. Samson, 32 N. Y. 703.
Boyle vs. Bradley, 26 Up. Can. C. P. R. 373.

In Walrath vs. Thompson, *supra*, when the case was first before the supreme court, the question was as to the meaning of the words "your account" in the letter of guaranty, whether it was a precedent account or a prospective account. *Held*, that the words were ambiguous, and open to explanation by parol. 4 Hill 200.

On the second trial it appearing that on delivery of the goods the plaintiff took a note of the principal, payable on the 22nd day of December following, or with grace, on the 25th, and the terms of credit by the guaranty were *January 1st*. *Held*, the guarantor was not liable. 6 Hill 540.

The court by Bronson J. says :

"If the note was out of the way, the fact that the plaintiff received the guaranty, delivered the property, and did not call for payment until the specified time had expired, would be a sufficient ground for presuming that he agreed to give the required credit. But the *note* takes away all ground for such an inference; and proves that the plaintiff did not give the specified credit to the principal. On the contrary, he made an agreement which obliged Johnson to pay at an earlier period. The fact that the credit was *abridged only a few days*, is not important. Cutting off a week is as fatal as though it had been a month."

So we argue : If the notes of Gilman & Dick were out of the way, it would leave the matter open to contest, but they prove that the plaintiff did not give the specified credit to the principal.

And it matters not in the case at bar that the last note was payable a month and a half earlier than January 1st 1879.

In Leeds vs. Dunn, *supra*, the letter of guaranty was given for goods to be sold on a credit of six months, and the goods were sold partly on four months and partly on six months. ***Held***, the guarantor was not holden for any part of the goods.

The only difference between that case and the one at bar is there the letter of guaranty mentioned the terms of credit, and parol evidence was allowed to show that the principal parties adopted other terms, but the principle is the same.

In the Georgia case, as quoted in Brandt, Sec. 338; ***held***, that a material alteration in the principal contract, even though for the benefit of the guarantor, discharged his obligation.

The Michigan case, 33—473, is very nearly our case. At the the time of the guaranty, which was in the form of a bond, and *did not specify the terms of credit*, save by reference to the principal contract, the principal parties had entered into an agreement for the sale of sewing machines by the plaintiff to David McVean, containing numerous provisions. In the seventh subdivision it was stated:

"*Seventh.* Said D. McVean shall give his note of hand for all purchases of machines, at the time of purchase, said notes to be on four months' time without interest. If so desired, an extension of time will be granted by O. M. Locke, (the plaintiff) equal to sixty days on each note, said McVean to pay interest therefor at the rate of eight per cent. per annum."

Subsequently on the various sales McVean gave his five promissory notes to the plaintiff therefor, payable six months after date, with interest after four months at eight per cent. (with one exception). *Held*, a departure fatal to any recover.

In the case at bar the variance is altogether more serious. Indeed, the notes introduced by the plaintiff prove a fatal variance in the matter of *interest* beyond what the complaint alleges.

And the defendants can have the advantage of it upon their general denial.

The original contract is "with interest at ten per cent. from maturity," (p. 10.) The notes bear interest from *date* July 28th, 1878, at ten per cent. and provide for "reasonable attorney's fees," (pp. 7, 8). By the contract maturity would have been September 15th and January 1st following.

The other cases cited illustrate that feature of the case at bar which is so essential to the defense, that the letter itself did not specify the terms of credit, was ambiguous in this particular, and hence is explainable by parol.

Perhaps no opinion in cases recently decided is more satisfactory upon the several rules of the law of guaranty there considered, than the one in 93 N. Y. 273, *supra*, by Ruger, Ch. J.

The letter of credit in that case is in form as follows:

"NEW YORK, December 29, 1874.

"Messrs. Bingham Bros., Evansville, Ind.

"DEAR SIRS:—Any drafts that you may draw on Mr. A. Feig-"elstock, of our city, we guarantee to be paid at maturity.

"Truly yours,

"KAUFFMANN & BLUM."

No guaranty could be more general except it is addressed to the firm of Bingham Bros., and not to the public generally. *Held,* to be a special guaranty for this reason.

And in construing this letter, the court stated three rules, as follows:

"Some controversy appears by the cases to have formerly existed in respect to the rule governing the courts in the construction of guaranties, whether that should apply which entitled a surety to have his contract strictly construed, or that imposing upon a party using the language the liability of having it interpreted most strongly against him, but the weight of authority now seems to favor that construction which shall accord with the apparent *intention of the parties*, in conformity with the rule governing the construction of contracts generally. (Citing cases).

"But when the *meaning* of the language used in a guaranty is ascertained, the surety is entitled to the application of the *strict* *rule* of construction and cannot be held beyond the precise terms of his contract. (Citing cases).

" When, therefor, the language of a guaranty is ambiguous and does not furnish *conclusive evidence* of its meaning, we are entitled to look at all the circumstances of the case and arrive at the intention of the parties from these sources of information. (Agawam Bank vs. Stever, 18 N. Y. 502; Brandt on Suretyship, 106; Walrath vs. Thompson, 4 Hill 200; Fell's Law of Guaranty, 43; Gates vs. McKee, *supra*; Keate vs. Temple, 1 B. & P. 158; Springsteen vs. Samson, 32 N. Y. 703; Karmuller vs. Krotz, 18 Iowa 852; Hasbrook vs. Paddock, 1 Barb. 637.) "

The Canada case, as stated in Brandt, Boyle vs. Bradley (26 Up. Can. C. P. R. *supra*), is in its main features precisely similar to the one at bar.

"M required machinery for a cheese factory, and gave A an order for it, which he refused to fill without security, B thereupon wrote to A as follows: 'I recommend M to you, and if he should fail in his promise to you for *anything in your way*, I consider myself jointly liable for the amount of $200, payable in six months to your firm.'

"A thereupon filled the order. *Held*, the meaning of the guaranty, when considered with reference to the surrounding circumstances, was that it applied to the specific order M had given for machinery and to no other." Brandt Sec. 143.

So in our case, the guaranty must apply to the *order Gilman had given*, which the company refused to fill without security, and the orders given "this spring" in pursuance of that order.

VI.

The sixth assignment of error, in denying defendants' motion for a new trial, embraces not only the errors in law occurring at the trial, which we have now considered, but insufficiency of the evidence to justify the verdict. One of the causes recognized by the code of this territory for granting a new trial is:

"6. Insufficiency of the evidence to justify the verdict or other decision or that it is against law." Section 286, Code of Civil Procedure.

Another section of the same code aids in the construction of what is deemed insufficiency of the evidence:

"Where, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, * * but a *failure of proof.*" Section 140.

In examining for evidence to justify the verdict in this case, the court must consider only the evidence within "the scope and meaning" of the cause of action as alleged in the complaint.

The only other requirement of the code as to an exception for insufficiency of the evidence is found in Section 279; as follows:

"But when the exception is to the verdict * * upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient."

In the case at bar the motion for a new trial designates the insufficiency of the evidence to justify the verdict as one of the grounds, and specifies the particulars thereof. (p. 20.)

The motion was overruled, and exception taken.

In the notice of appeal to the supreme court of the territory, the appellants designate for review the order overruling said motion as provided by an act of the legislative assembly of the territory entitled "An Act to Amend Section Twenty-two of the Code of Civil Procedure" approved February 20th, 1879, providing:

"Upon the final judgment or decision being rendered, the appellant on his appeal from such final judgment or decision, may have any intermediate order enumerated in this section (section 22 enumerates an order refusing a new trial) reviewed by the supreme court by designating such order sought to be reviewed in his notice of appeal from the final judgment." *

Chapter I. Laws of 1879.

See notice of appeal (pp 21, 22.)

We are aware of the rule of this court, which is in harmony with the general rule in courts of review, that the verdict of a jury will not be set aside where there is a conflict of evidence, or even where the verdict is contrary to the weight of evidence. And we now ask the court to review the ruling of the district court in refusing to set aside the verdict and grant a new trial for insufficiency of the evidence, and the action of the supreme court in affirming such ruling, upon the theory that the evidence is of such a conclusive character as to require the court as a matter of law, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it.

Montclair vs. Dana, 107 U. S. 162.

Randall vs. R. R. Co., 109 U. S. 478.

In support of the exception that the evidence is insufficient to justify the verdict we claim that all the evidences without material conflict shows affirmatively that the orders referred to in in the letter of guaranty were given and accepted upon terms of credit, and payment by which one-half became due September 15th, 1878, and the other half January 1st, 1879, and that subsequently on July 28, 1878, these terms were altered to correspond with the terms of said notes, without the consent of the defendants. If so, this verdict cannot stand.

All the evidence is contained in the record, (p. 16—original record p. 37).

In the order of events we start with "Exhibit A." There is no dispute that this contract was signed about the day of its date January 21, 1878, by Gilman and by the company "per P. E. Fowler," and returned to the office of the company at Moline, Illinois, and a copy retained by Gilman. It was intended as an order for the goods mentioned, and as a contract for the season, and was made out upon the company's own printed form. The terms agreed upon therein were one-half September 15, 1878, and one-half January 1, 1879, and it is stated all the goods ordered during the season will be on the same terms, and are to be paid for in the same manner. It has a price list attached. (p. 10).

Some information as to Gilman's commercial standing induced the company to delay or decline the the order until some security was furnished. The letter of guaranty shows that the defendants became aware of the difficulty, whereupon they wrote this letter, and it was sent to the company in Gilman's letter of the same date, in which he inquires, "Will you accept *my order* under the recommend inclosed? What order? There was no other order than the one of January 21st. Referring to this "order" the company shipped the goods, and during the same spring filled four other orders of Gilman for like goods. *The principals never met in the transaction,* until their settlement in July long after the season covered by the guaranty had expired.

And the evidence shows that this contract of January 21st, *was adopted by the parties,* as the only basis of terms of credit and payment. No other terms were ever mentioned in any of the correspondence between the parties. No other terms were contemplated by the officers of the company.

We have the deposition of both Lobdell, the secretary of the company when the transaaction occurred, and Carson, his successor in office, who was secretary when his deposition was taken.

Carson testifies: "Exhibit A" is the original order sent to the plaintiff by an agent Mr. Fowler. * * * * As far as I know there was no agreement or contract for the payment for goods furnished in 1878 other than that mentioned in the original order. It was the custom of the plaintiff to fill all orders during the season under the terms of the original contract or order, and which is specially mentioned in the printed part. To my knowledge there was no agreement except the conditions mentioned in the order of January 21, 1878, under which all subsequent shipments were made, and the records of the office show no other agreement. * * * And the letter of guaranty was accepted as security for all goods furnished under said order or contract. And the witness says nothing to the contrary on the subject.

Lobdell also says: I have examined "Exhibit A," know it was received by the company, and on account of the reported standing of Gilman, we declined to fill the order. Afterwards on account of the receipt of a certain guaranty, the company decided to fill the order, and did so. (Witness then states as to filling four subsequent orders). Gilman's order of January 21, 1878, in connection with the guaranty constituted the contract upon which the goods were sent. That is my understanding of it.

We remark that the foregoing testimony by the managing officers of the company would ordinarily be held conclusive upon the corporation.

Gilman also testifies: Have seen this paper before, "Exhibit A." That is my signature. The last time I saw it was when we settled up for the goods in July 1878. Mr. Fowler had that paper and I had another. We settled up for all goods I had from the company for the season amounting to $1,050. I paid $50 in cash and gave the notes of Gilman & Dick for the balance. And these are the notes (notes in evidence). When we settled we had no other papers before us except this contract, prices and everything.

Mason also testifies: Was present at a settlement about the last of July, 1878, between Fowler and Gilman & Dick. Saw this paper there then, "Exhibit A." The agent said he had given more time in the contract than the company wished, and so they compromised the matter and settled that both notes should be made due in the fall of 1878.

The entire evidence, the contract itself, the written testimony of the officers of the company, the shipment of the goods, the conduct of the parties during the entire season of sales, acting and relying upon terms perfectly understood without question or dispute, the production of the contract when the day of settlement came by the plaintiff's same agent who signed it—all make a clear, positive, uncontradicted case, as stated in the answer and in this our exception to evidence, showing affirmatively that the orders referred to in the letter of guaranty were given and filled upon *other and different terms* of credit and payment, from those adopted on the settlement, and mentioned in the notes.

And now to make our exception complete, we have only to call attention to the fact, which is in proof without controversy, that this settlement was had and these new terms adopted without the knowledge or consent of these parties. Schaetzel swears positively that he knew nothing of it until the notes had matured and been sent to the bank for collection. Gilbert testifies positively that he was entirely unaware of any such thing, until he was told by Gilman some time afterwards. Mason testifies they were not present at the settlement.

Here then is a case of complete exoneration, by evidence that is not contradicted or avoided. It is clear, full and complete, and no judge can read it, or court hear it, and find otherwise.

How then, this astonishing verdict? As said in a New York case: "It is the bold case of a trial of a single issue, in which the plaintiff had a verdict, without any testimony in conflict with an established defense."

Algeo vs. Duncan, 39 N. Y. 315.

Yes, a defense established without any conflict of testimony, and without any fact in avoidance or reply. A defense established mainly by the plaintiff's own evidence. The plaintiff produces these notes, showing a complete alteration of all terms ever before heard of in the transaction. The plaintiff produces its account of settlement, of even date with the notes, signed by both parties at the same time, showing a liquidation of the indebtedness, $1,051.05, by bills receivable, dated July 28, 1878, due Sept. 15, 1878, $550.53; due, Nov. 15, 1878, $450; cash to balance, $50.52; and a change too in every particular for the benefit of the company, making the first payment $100 more than the second, and the second a month and a half before January 1, 1879.

The plaintiff produces Lobdell and he says: These notes were taken upon that settlement. A blank is furnished our traveling agents to report their business when out on their trips. That is a statement by Fowler, our agent, of his settlement with Gilman. The notes accompanied the statement.

Then we put Gilman on the stand and he says, yes, that was the settlement then made. With the original contract before them, showing the season's terms agreed upon, they change the whole bargain to correspond with those notes. And Mason says the change to earlier payments was because Fowler had given in that contract more time than the company desired, and "so they *compromised* the matter, and settled that both notes should be made due in the fall of 1878." A complete alteration then is shown without conflict of testimony. Both parties admit that this is what transpired on the settlement without the knowledge or consent of these plaintiffs in error.

This verdict was one of those mysteries of the jury box into which we do not care to inquire. If not perverse, it was the result of some gross misapprehension on the part of the jury. It may be they did not understand what terms of credit and payment the plaintiff was bound to prove, as the original terms agreed upon, within the scope of its pleadings. More than likely they were misled by the instructions of the court to which exceptions are taken.

There is one reason why this court may look into the sufficiency of the evidence that does not exist in many cases, and that is the character of the evidence, which rests almost entirely in *written proof*. There is no question in the case as to the credibility of opposing witnesses, to be judged of from their appearance on the stand. The original order signed by both parties, the order of March 9th, and the four subsequent orders of Gilman, the account of settlement and the two notes in evidence, are the written evidence of the agreement and the transaction between the *principal parties*. They never met, except in the beginning, when the original order was taken, and at the close, when the settlement was had. The testimony of the two managing officers of the company is also in writing, and no one controverts their deliberate evidence. And the defendants' obligation is also in writing. Gilman and Mason also testified as to the settlement, and no witness opposes them. The defendants are called merely to prove they knew nothing about the settlement, and no witness opposes them. The only witness whose testimony suggests any discrepancy, is Lobdell, and his discrepancy, *is only with himself*; and that too in quite an immaterial point, whether the contract of January 21st was laid aside by the company, or merely held in suspense, until the security was furnished. But then he goes on to explain, consistently with his deposition, and as shown by all the evidence on the subject, that when the security *was* furnished this contract was revived, and readopted as the basis of the season's sales, and acted upon without dispute by both parties until the day of settlement. "I do not mean to say that we shipped those goods without stating any prices or terms. Mr. Gilman had our price list (annexed to the contract, the record shows) and knew what the terms of credit were. We accepted the guaranty and order of March 9th upon the usual season's terms *such as were embraced in that contract.*"

And so every question upon this record is a question of law. That the verdict is unsupported by the evidence, is a matter of law. That there is no evidence to prove these *unequal payments, and one of them in November*, set up in the complaint, as the indebtedness guaranteed by these plaintiffs in error is a matter of inspection and a matter of law. That all the evidence, without material conflict, shows that the season's terms, upon which the goods were sold and payment guaranteed, were subsequently on settlement materially altered, without the consent of the guarantors, is also a matter of law for the court. If this be so, the next assignment of errors is well taken that the verdict is against law. And the supreme court of the territory erred in affirming the judgment.

We now ask this court to administer the law. We have aimed to be accurate in our statements and make plain to the court the grounds, on which we insist this verdict must be set aside, even at the hands of an appellate court. If there were anything further we could add, to aid the court in this examination, we would not yet wipe the pen, nor pause in the argument.

Respectfully submitted,

H. K. WHITON,

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WINSOR & SWEZEY,

Attorneys for Plaintiffs in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 72.

HERMAN GILBERT AND
JACOB SCHARTZEL, JR.,
Plaintiffs in Error.
vs.
THE MOLINE PLOW COMPANY.

BRIEF OF DEFENDANT IN ERROR.

R. D. MUSSEY,
Of Counsel.

R. BERESFORD, PRINTER,
WASHINGTON, D. C.

[*Note.* **References in this Brief are to the paging of the *printed* Transcript.**]

THE RECORD.

It is proper to remark preliminarily, that the Record herein is, to say the least, inartistic as a Record; and that the Transcript sent up abounds with clerical errors.

What, if there be a Bill of Exceptions, answers that purpose is to be found on pp. 5 to 21 inc.; and the Judge's certificate (and allowance ?) of it (p. 21) speaks of it as "following" when it precedes. It would appear (p. 19) that instructions were asked by the Plaintiff below, and that the Defendants below excepted to the Plaintiff's fifth instruction, and to

> **the Plaintiff's first instruction commencing &c—to the end of the first instruction**

and

> **to the Plaintiff's second instruction as modified and given.**

These "instructions" are not set out; the Judge's charge is given (pp. 17 to 19 inc.); and there are bracketted numbers at the side of it. Inferentially we may suppose that these numbers have something to do with the "Plaintiff's instructions" referred to; but how far the paragraphs they adjoin reproduce the Plaintiff's Prayers and how far they represent the Court we cannot determine.

Nor can we determine, with precision, what portions of the charge embrace the "Plaintiff's instructions" excepted to, so that the application of the "Exceptions" and "assignments of Errors" (p. 39) becomes a matter of inference—not to say conjecture.

In the Brief for the Defendants-in-Error, Counsel set out (p. 16) what they understand to be—

the instruction (plaintiff's request No. 1) to the jury, to which exception was taken.

And also—

the instruction (plaintiff's request No. 2) to the jury, to which exception was taken.

Is there anything in this Record which renders it possible for this Court to be sure that the "exceptions" noted were taken to the "instructions" as quoted?

It would seem that the attention of the Court is not directed to the alleged Errors, in this respect with sufficient particularity to avoid the application of the rule stated in *Burton vs. West Burton Ferry Co.*, 114 *U. S.*, 474, 476; and *Conn. L. I. Co. vs. Union Trust Co.*, 112 *U. S.*, 250, 261.

If this defect is not fatal, and the leniency shown in *U. S. vs. Morgan*, 11 *How.*, 154, is extended to this Record, it may assist the Court in its ascertainment of the facts to present the following brief presentation of them.

THE FACTS.

One Peter Gillman, resident at Sioux Falls, Dakota, in January, 1878, desired to get, on credit, from the Moline Plow Company, certain agricultural implements for sale, and gave an order therefor to P. E. Fowler, the Plow Company's traveling agent. (pp. 10 and 11). The Company declined to fill this order after looking up Gillman's commercial standing, and so notified him, (p. 11). (This letter of notification is not produced; an omission to be referred to hereafter.)

Thereupon Gillman sent the Company a letter under date of March 9, 1878, (p. 5,) enclosing a *recommend*, or guaranty, as follows:

SIOUX FALLS, D. T., *March 9th*, 1878

MOLINE PLOW CO.,
Moline, Ill.

Sirs: We, the undersigned, are acquainted with Peter Gillman, of this place, (formerly of Fon du Lac, Wis.,) and have no hesitation in endorsing him as an honest, capable business man, and deserving of confidence and credit. We think your informant in regard to Mr. Gillman's business ability and capacity, was in error, if not selfish and malicious. We will satisfy all orders Mr. Gillman gives this spring, such as plows and cultivators.

WM. B. DICK,
H. GILBERT,
JACOB SCHARTZEL.

There is a variation of the order given in this letter of March 9th from that in the "order" of January 21st, to be referred to hereafter.

The Secretary of the Plow Company notified Gillman that the "recommend" was satisfactory (p. 6) and goods were sent on this and other orders amounting to $1,051.05.

In July, 1878, the Plow Company's Agent "settled" with Gillman by getting $50.52 in cash and two notes, one for $550.53, payable September 15, 1878, and one for $450, payable November 15, 1878. These notes were signed by Gillman and Dick, who was one of Gillman's "recommenders," or guarantors.

Whether Dick was only a "recommender" or whether he was secretly (so far as the Plow Company was concerned) interested with Dick in the business does not appear.

The notes were not paid, and the Company brought suit against the "recommenders" May 30, 1879. Apparently there was a mis-trial (see Carson's deposition, p. 10); and upon the second trial the Company recovered against Gilbert and Schartzel, having discontinued as to Dick, who made no answer and died some time prior to this trial. (p. 16.)

Motions for new trial, &c., were overruled by the District

Court, and the Supreme Court of the Territory on appeal sustained the lower court, and the Defendants below bring the case here.

POINTS.

Upon the appeal from the District to the Supreme Court of the Territory nine points of error were assigned (p. 22). The assignment of errors accompanying the Record names nine alleged errors; the brief for the Plaintiffs-in-Error relies upon eight alleged errors.

Of these the eighth (numbered *ninth*) is general, and, as it were, a summary of such as precede it. It is not necessary to consider it in detail.

The fifth, sixth, and seventh (numbered *sixth*, *seventh*, and *eighth*) are also general:

> that the motion for a new trial was denied;
> that the verdict was not set as against law;
> that the evidence is insufficient to sustain the verdict.

The first and second are addressed to the admission and exclusion of testimony, and the third and fourth to the charge of the Trial Court.

I.

The first point made by the Plaintiffs-in-Error is that a letter press copy of a letter written by Mr. Lobdell, then Secretary and Business Manager of the Plow Company, should not have been introduced in evidence. This bit of evidence and the manner of its introduction are set out on p. 6 of the Record.

In strictness, perhaps, Gillman should have been called upon to produce the letter before Lobdell testified to the letter press copy. But it is submitted that after Lobdell had, unchallenged, testified to the writing of the letter and its purport, that he had sent it to Gillman, and under it sent him goods—it is submitted, we say—that after all this was in, it was rather late to object to the letter press copy itself as secondary. For all the damage *it* could do the Defendants below had been done without any objection on their part. It was, as is strongly pointed out by the learned Judge who delivered the Opinion of the Territorial Court, "wholly immaterial whether the plaintiff [below] replied to the letter [of Gillman] or not," (pp. 31, '2.) The rule there laid down is the settled rule of this Court.

Mining Company v. Taylor, 100 *U. S.*, 37.

It may be doubted, too, though the resolution of such a doubt, favorably to the Defendant-in-Error, is not conceived to be necessary to the affirmance of the judgment below—whether a "press copy" of a letter made, practically cotemporaneously with the writing of the letter, is not rather a *duplicate* than a *copy*, using those terms in their technical sense. The two are made by the same ink, and in the identical hand, and with an accuracy as to minute detail impossible to be obtained in a *copy*.

Nor can it be doubted that, if the objection to this "press copy" had prevailed, the Defendant-in-Error would have had read the "office copy" of the letter which Carson's deposition (*read for the Plaintiffs-in-Error*) had appended to it as *Exhibit E*, (pp. 10–12.)

II.

The second point made by the Plaintiffs-in-Error is that the Trial Court erred in excluding the answer of Lobdell to Interrogatory 11, of his "Deposition," (pp. 13 and 14).

Whether this Deposition was taken for use at the prior trial, or at this, or when it was taken, there is nothing in the Record to show, though the opinion of the Supreme Court of the Territory says it was designed for use at the prior trial, (p. 32).

The question asked was whether there was

> any agreement between the plaintiff [below] and Gillman, or between the plaintiff and defendants [below], that the time mentioned for payment in the order of Jan. 21, 1878, should govern for any and all sales made during the spring of 1878, under the defendants' [below] letter of guaranty? If so state regarding it.

This was a question susceptible of, and intended to evoke, a categorical answer.

There either (1) was, or (2) was not, such an "agreement;" or (3) the Witness had no knowledge on the subject. The only answers that were responsive were "*yes*" or "*no*," or "*I do not know*." If there was such an agreement and the Witness knew what it was and said there was he was to say what it was.

The answer was properly rejected, as the Territorial Court held, for Mr. Lobdell's "understanding" or opinion about the matter did not rise to the dignity of knowledge. It was knowledge of a fact that was called for. To this call he responded with the statement of his construction of certain other facts.

The Territorial Court committed no error in sustaining the exclusion of this Answer. And, as is pointed out by that Court in its Opinion (pp. 32, 33), the reading of the Deposition of a Witness who is present in Court, where no foundation has been laid for using it in contradiction, or by way of impeachment is inadmissible.

Moreover, in view of the real question at issue in this case and the Law governing it, the Plaintiffs-in-Error sustained no injury by the exclusion of this Answer, as will be seen hereafter.

III.

The controlling point in controversy, and the one mainly relied upon by the Plaintiffs-in-Error, is that the Trial Court erred in its instructions to the Jury in respect of the liability of the Defendants [below] as Guarantors.

If the Court held rightly in this respect there is an end to the case.

It is not necessary to follow in detail the opposing argument on this point. For that argument, able though it is, does not give the Law of the case.

The relations, obligations, limitations, and scope of the contract of guaranty, as known to the common law* are stated by this Court in the cases (not on the Brief of the Plaintiffs-in-Error) of,

Davis Sewing Mach. Co. vs. *Richards*, 115 *U. S.*, 524, and *Davis* vs. *Wells*, 104 *U. S.*, 159.

This was a Dakota case, tried by a Dakota Court and under Dakota Law. It is submitted that that law settles the case.

Counsel for Plaintiffs-in-Error have cited from the Dakota Law the definition of a guarantee.

This is Section 1649 of the Civil Code (Mr. David Dudley Field's Civil Code, enacted it is believed into law by Dakota before its adoption elsewhere). In the Appendix to this Brief are cited the other sections of the Code bearing on guarantee, and also those relating to Letters of Credit.

To the one or the other, or perhaps to both, of these categories belongs this "recommend."

If it be a "letter of credit" no notice of its acceptance by the Defendant-in-Error was necessary to bind the writers; and under Section 1696, no terms or limitations having been imposed by it, the creditor could make any terms he pleased with his principal debtor.

Treat it as a guaranty, and the necessity for notice of acceptance is removed.

Indeed there is no contention here, on the Record at least, that there was any objection of that sort raised.

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*This term is used in its ordinary sense for convenience. The writer of this Brief does not profess to know precisely what the "Common Law" did hold about guaranty, but he can appreciate the rule which has been created by the Common Law as administered by English Courts, guided perhaps by statutes, and the American Courts that have followed their lead.

Clearly, under Section 1659, if this was a "guaranty" it was an "unconditional" guaranty. It was not a guaranty that if the Plow Company would fill Gillman's orders and settle with him in a particular way the guarantors would make good his default. But it was as the Trial Court held (p. 17) an undertaking

> absolute and unconditional, and in pursuance of its terms the plaintiff [below] was authorized to fill the orders of Gillman, given during the Spring of 1878, to any extent and upon any terms that might subsequently be agreed upon.

The only limitation or restriction was that Gillman's orders should be for "such as plows and cultivators," and should be given "this Spring."

There is no pretence of objection to the time when Gillman did give the orders, nor that the goods ordered were not "such as plows and cultivators."

Gillman evidently understood this "recommend," be it "letter of credit" or "guaranty" to be general, for he gave an order in the letter that transmitted it, and subsequent orders, and subsequently, March 30, April 18th and May 2d, ordered other similar implements, and received them.

The Plow Company regarded the "recommend" as general, and so treated it; and the Plaintiffs-in-Error, until called upon to assume the responsibility they had voluntarily incurred, so treated it and so regarded it. For they must be held to have intended the consequences of their deliberate act.

But the contention at the trial was, and has continued to be, that somehow this "recommend" had incorporated in it the "contract" of January 21st, 1878, between Gillman and Fowler, which prescribed terms of payment; and that they, the Plaintiffs-in-Error, are released, (or "exonerated," to use the terminology of the Dakota Code,) by a subsequent change of terms of settlement, made by the Plow Company's Agent and Gillman and Dick.

That there was such a connection as this is an ingenious afterthought, wholly unwarranted by any testimony in the Record. It is a question of fact found by the Jury adversely to the Plaintiffs-in-Error after a full and fair submission of it to them by the Trial Court (pp. 18, 19).

It is not believed that this Court will go out of its way to help a contention like this, which is not grounded in either commercial or ethical morality. For it is clear that but for this "recommend" the Company would not have parted with its goods to Gillman, whose default in paying for them proved that his commercial rating was correct. The Plaintiffs-in-Error certified that they endorsed him as an "honest, capable business man, and deserving of confidence and *credit*," and that they would "satisfy all orders" he gave "this Spring, such as plows and cultivators." So the Company gave him "*credit*"; and the "*confidence*" the Company gave him upon this "*endorsement*" having been misplaced is it not proper that they should "*satisfy*" the "*orders*" he gave?

It is true that exception was taken by the Plaintiffs-in-Error to the refusal of the Trial Judge to submit to the Jury three special issues framed by them, covering this line of defence, and instruct that a special verdict might be rendered upon any or either of them, (pp. 16 and 17.) But, while the Court was justified (see Opinion, pp. 33 *et seq.*) in this refusal on technical grounds of practice, it did in effect submit the issues to the Jury. It stated the defence even more clearly than the "issues in writing" do, and the Jury passed upon it.

It is difficult to see how from this Record it could have done otherwise.

Not only is there an entire failure of any proof that the Plaintiffs-in-Error contemplated guaranteeing the fulfilment by Gillman of the "contract" of January 21, 1878; but there is an entire absence of any proof that either of these two ever heard of it until after the "settlement" with Fowler in July, 1878. Moreover, it was in evidence that Gillman, in his "order" accompanying to the "recommend," called for a different bill of goods from what the "contract" named. Would he have done this had he thought that the "recommend" only covered the specific "contract" of January 21, 1878? Would he have gone on and ordered other goods, from time to time, as he did? And would the Company have filled his Orders if security for the January contract was only in its contemplation when it received the "recommend?"

But if it be said that probably neither Gillman nor the Company were versed in the learning of "Guaranty," and that no argument should be drawn from their acts under the "recommend," there are omissions in the evidence of large significance. Gillman was on the stand, but he did not produce the letter of the Company declining to enter into the "Contract" of January. He did not offer to testify to what he had told his "recommenders" to procure their "endorsement." If he had said to them—"Fowler and I made terms as given in this contract; the Company declines to deal with me. Will you guaranty my fulfillment of the terms of that Contract?"—is it possible that his able Counsel could have omitted to, at least, offer to show this? But there is no such offer. Schartzel took the stand, and apparently he had never heard of the "contract" until he told Hollister, of the Bank, who presented the over due notes and the "guaranty," that he (Schartzel) "had nothing to do with the notes."

Gilbert, too, was called as a Witness, and he says nothing about his knowledge of any such contract.

Here was a case where a "guaranty" or "letter of credit," general, absolute, and unconditional, (save as to the period in which orders for agricultural implements are to be given) in writing, was sought to be modified by reference and relation to a certain other writing, not expressly named or connected with it and not one of the parties who seeks such modification, opens his mouth to say that he so understood it or produces a scrap of writing to so connect the two!

What could the Jury conclude but that the alleged relation was an afterthought?

IV.

The lower Court, it may be said generally, and without further discussion, committed no error in refusing to set aside the Verdict and give a new Trial.

There is certainly enough in this Record to justify a Verdict and Judgment thereon.

But it is again respectfully submitted that the Record does not present the points sought to be raised against the action of the Trial Court with that precision and definiteness which should exist to bring them fully and fairly before this Court.

V.

In Brief.

The Record is faulty as a Record.

Disregarding those faults and getting at what appears to be the gist of the controversy, the Plaintiffs-in-Error gave a "letter of credit" or "guaranty" to the Defendant-in-Error in favor of one Gillman, upon which the Defendant-in-Error gave him credit, and he defaulted.

This "letter of credit" or "guaranty" was in writing, and on its face unconditional and absolute.

The Plaintiffs-in-Error sought to avoid their liability under this paper by alleging that it, by relation, embraced certain terms as to settlement contained in another and separate paper, which were not followed.

And this question of fact having been submitted to a Jury, the Jury determined the fact against them.

R. D. Mussey,
Of Counsel.

not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance.

Article III. Interpretation of guaranty.

§1655. *Implied guaranty.* In a guaranty of a contract, the terms of which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common, in similar contracts, where the principal contract is to be performed.

§1656. *Of solvency.* A guaranty to the effect that an obligation is good, or is collectible, imports that the debtor is solvent, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence.

§1657. *Recovery.* A guaranty, such as is mentioned in the last section, is not discharged by an omission to take proceedings upon the principal debt or upon any collateral security for its payment, if no part of the debt could have been collected thereby.

§1658. *Insolvency presumed.* In the cases mentioned in section one thousand six hundred and fifty-six, the removal of the principal from the territory, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal, in its effect upon the rights and obligations of the guarantor.

Article IV. Liability of Guarantors.

§1659. *Guaranty construed.* A guaranty is to be deemed unconditional, unless its terms import some condition precedent to the liability of the guarantor.

§1660. *Liability—when and how.* A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice.

§1661. *Of conditional obligation.* Where one guaranties a conditional obligation, his liability is commensurate with that of the principal, and he is not entitled to notice of the default of the principal, unless he is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor has actual notice thereof.

§1662. *Limitation of obligation.* The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if, in its terms, it exceeds it, it is reducible in proportion to the principal obligation.

§1663. *Illegal contract void.* A guarantor is not liable if the contract of the principal is unlawful, but he is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal.

Article V. *Continuing guaranty.*

§1664. *Definition.* A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty.

§1655. *Revocation.* A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce.

Article VI. Exoneration of guarantors.

§1656. *Exoneration.* A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.

§1657. *Void promise.* A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy, within the meaning of the last section.

§1668. *Alteration rescinded.* The rescission of an agreement altering the original obligation of a debtor, or impairing the remedy of a creditor, does not restore the liability of a guarantor who has been exonerated by such agreement.

§1669. *Part performance.* The acceptance, by a creditor, of anything in partial satisfaction of an obligation, reduces the obligation of a guarantor thereof in the same measure as that of the principal, but does not otherwise affect it.

§1670. *Delay no discharge.* Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor.

§1671. *Indemnity.* A guarantor, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the guarantor, may have modified the contract or released the principal.

§1672. *Act of law.* A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor.

CHAPTER II.

SURETYSHIP.

Article I. Who are sureties.
II. Liability of sureties.
III. Rights of sureties.
IV. Rights of creditors.
V. Letter of credit.

Article I. Who are sureties.

§1673. *Definition.* A surety is one who, at the request of another and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor.

§1674. *Surety who appears principal.* One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal.

Article II. Liability of sureties.

§1675. *Obligation.* A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach he cannot in any case be liable for more than the penalty.

§1676. *Like other contracts.* In interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts.

§1677. *Continues as surety.* Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety.

§1678. *Exoneration.* Performance of the principal obligation, or an offer of such performance, duly made as provided in this Code, exonerates a surety.

§1679. *Same.* A surety is exonerated:

1. In like manner with a guarantor;

2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights or which lessens his security; or—

3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do.

Article III. Rights of sureties.

§1680. *Rights of a guarantor.* A surety has all the rights of a guarantor, whether he becomes personally responsible or not.

§1681. *Proceedings against principal.* A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if, in such case, the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.

§1682. *May compel principal.* A surety may compel his principal to perform the obligation when due.

§1683. *Reimbursement.* If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other

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§1684. *Same.* A surety, upon satisfying the obligations of the principal, is entitled to enforce every remedy which the creditor then has against the principal, to the extent of reimbursing what he has expended; and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.

§1685. *Entitled to all securities.* A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety, at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.

§1686. *Principal's property first.* Whenever property of a surety is hypothecated with the property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation.

Article IV. Rights of creditors.

§1687. *Right to every security.* A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction.

Article V. Letter of credit.

§1688. *Definition.* A letter of credit is a written instrument, addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn.

§1689. *To several.* A letter of credit may be addressed to several persons in succession.

§1690. *When writer liable.* The writer of a letter of credit is, upon the default of the debtor, liable to those who gave credit in compliance with its terms.

§1691. *Classes defined.* A letter of credit is either general or special. When the request for credit, is addressed to specified persons by name or description, the letter is special. All other letters of credit are general.

§1692. *General.* A general letter of credit gives any person to whom it may be shown authority to comply with its request, and by his so doing it becomes, as to him, of the same effect as if addressed to him by name.

§1693. *Successive credits on.* Several persons may successively give credit upon a general letter.

§1694. *Continuing guaranty.* If the parties to a letter of credit appear by its terms to contemplate a course of future dealing between the parties, it is not exhausted by giving a credit, even to the amount limited by the letter, which is subsequently reduced or satisfied by payments made by the debtor, but is to be deemed a continuing guaranty.

§1695. *Notice to writer.* The writer of a letter of credit is liable for credit given upon it without notice to him, unless its terms express or imply the necessity of giving notice.

§1696. *Credit must agree with letter.* If a letter of credit prescribes the persons by whom or the mode in which the credit is to be given, or the term of credit, or limits the amount thereof, the writer is not bound, except for transactions which, in these respects, conform strictly to the terms of the letter.